(9)

No. 83-2126-CSY
Status: GRANTED

Title: Oklahoma, Petitioner
v.
Timothy R. Castleberry and Nicholas Raineri

Docketed:
June 11, 1984

Court: Court of Criminal Appeals
of Oklahoma

Counsel for petitioner: Lee, David W.

Counsel for respondent: Eldridge, C. Kent, Cox, Charles Foster

Entry	Date	Note	Proceedings and Orders
1	Jun 11 1984	G	Petition for writ of certiorari filed.
2	Jul 18 1984		DISTRIBUTED. September 24, 1984
3	Aug 9 1984	P	Response requested. (Due September 8, 1984 - NONE RECEIVED)
4	Sep 8 1984		Brief of respondents Timothy Castleberry, et al. in opposition filed.
6	Sep 19 1984		REDISTRIBUTED. October 5, 1984
9	Oct 18 1984		REDISTRIBUTED. October 26, 1984
11	Oct 29 1984		REDISTRIBUTED. November 2, 1984
12	Nov 5 1984		Petition GRANTED.
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13	Dec 21 1984		Brief of petitioner Oklahoma filed.
14	Dec 21 1984		Joint appendix filed.
15	Dec 21 1984		Brief amicus curiae of Americans for Effective Law Enforcement, et al. filed.
16	Dec 24 1984		Brief amicus curiae of California filed.
18	Jan 24 1985		Order extending time to file brief of respondent on the merits until February 1, 1985.
19	Feb 1 1985		Brief of respondent Timothy R. Castelberry, et al. filed.
20	Feb 5 1985		SET FOR ARGUMENT. Wednesday, March 20, 1985. (2nd case).
21	Feb 11 1985		CIRCULATED.
22	Feb 19 1985		Record filed.
23	Feb 19 1985		Certified copy of record on appeal received.
24	Mar 7 1985	X	Reply brief of petitioner Oklahoma filed.
25	Mar 20 1985		ARGUED.

No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

THE STATE OF OKLAHOMA,
Petitioner,

v.

TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Fourth Amendment principles set forth in United States v. Ross, 456 U.S. 798 (1982), when an officer has probable cause to believe that there is contraband in a specific container in a vehicle, he is required to obtain a search warrant for the vehicle and the compartments and containers therein or may he search the vehicle and compartments and containers for contraband without a warrant.

2. Whether, when officers arrest a suspect on probable cause, and the suspect, who is standing next to the vehicle, is able to place a container inside of a vehicle, the police may search the container as being a search incident to arrest.

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1983

No. _____

THE STATE OF OKLAHOMA,
Petitioner,

v.

TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

The Petitioner, the State of Oklahoma, by the Attorney General of Oklahoma, Michael C. Turpen, prays that a Writ of Certiorari issue to review the judgment of the Oklahoma Court of Criminal Appeals in this matter.

OPINIONS BELOW

The decision of the Oklahoma Court of Criminal Appeals from which the certiorari is sought was reported as Castleberry v. Oklahoma, 678 P.2d 720 (Okl.Cr. 1984). See Appendix A. This Opinion was filed on January 23, 1984, and the State of Oklahoma's (hereinafter referred to as "the State") Petition for Rehearing was denied on April 5, 1984. The Court's mandate was issued on April 11, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

> describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

At approximately noontime on June 9, 1981, Officer R. D. Taylor of the Oklahoma City Police Department, Narcotics Division, received a telephone call from an informant advising him that at the Southgate Inn, located on South Interstate Highway 35 in Oklahoma City, Oklahoma, the informant had seen a large quantity of marijuana, some cocaine, and white pills in Room 113. The informant gave the officer a description of the men in the room and of the suitcase containing some of the narcotics. The informant also told the officer that one of the men was Tim Castleberry and the other was named Nick. The officer was also informed that they were driving a

1980 or 1981 blue Thunderbird with Florida license plates (Tr. I, 5-7).[1]

Officer Taylor immediately went to the location. He drove through the parking lot and observed a blue 1980 or 1981, Thunderbird with Florida license plate in front of Room 113. He parked his vehicle approximately 5 parking spaces away from the car and went into the desk clerk, and after telling her that he was a police officer, inquired as to who was staying in Room 113 (Tr. I, 7). The desk clerk said that it was registered to a Tim Castleberry (Tr. I, 8).

The officer returned to his car and waited (Tr. I, 8). He had previously

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[1]The following transcript designations will be used: Tr. I - Transcript of proceedings held on September 1-2, 1981 (F-82-227); Tr. II - Transcript of trial proceedings held on September 23-24, 1981 (F-82-228).

called for assistance (Tr. I, 7). After a short wait, Officer Taylor observed the Respondent Castleberry (hereinafter referred to as the "Defendant Castleberry") exit the motel room carrying a baby blue leather suitcase (Tr. I, 8), and place it in the trunk of the car. He left the trunk open and the Respondent Raineri (hereinafter referred to as "Defendant Raineri") came out carrying two plaid suitcases, which were also placed in the trunk. Then a young male came out and went to a red car parked next to the Thunderbird. The Defendant Castleberry again came out of the room carrying another blue suitcase, which he placed in the backseat of his vehicle.

After inquiring about his backup, Officer Taylor approached the car while the door and the trunk were still open (Tr. I, 9). All three men were standing

outside. He held his badge in one hand and his service revolver in the other, advised the men he was a police officer and ordered them to place their hands on the car.

The Defendant Raineri placed his hands on the vehicle as ordered (Tr. I, 10), but the Defendant Castleberry, after closing the trunk of the car, reached behind his back. The officer twice asked him to place his hands on the car, but instead, the Defendant Castleberry threw something from behind his back into the car (Tr. I, 11). Officer Taylor then attempted to physically force the Defendant Castleberry to place his hands on the car, but ended up wrestling him to the ground.

While sitting on the ground, the Defendant reached up, locked the car

door, and closed it. The car keys were still in the car door.

At this time, Officer Taylor's partner, Cfficer Bill Citty arrived. Officer Taylor gave Officer Citty the car keys, told him he had smelled marijuana coming from the trunk, and asked him to open the trunk. Officer Citty then opened the trunk and also smelled marijuana (Tr. I, 11). Officer Citty then opened one of the suitcases and observed marijuana. Officer Taylor then advised the men that they were under arrest. Officer City then opened the blue leather suitcase and found that it contained a large sum of cash and a clear plastic baggy containing approximately 10 ounces of white powder (Tr. I, 12). The powder was later determined to be methaqualone powder (Tr. I, 37).

Officer Citty then opened the car door and searched the interior (Tr. II, 13). In that search, he found a white Band-Aid box on the dashboard of the vehicle which contained approximately an ounce of white powder (Tr. II, 14, 59-60). This white powder was later determined to be cocaine (Tr. II, 68).

The Defendant Castleberry was individually charged and tried for the offense of Possession of a Controlled Dangerous Substance with Intent to Distribute and was convicted of Possession of a Controlled Dangerous Substance. The Defendants Castleberry and Raineri were jointly charged and tried on two (2) counts each for the offense of Possession of a Controlled Dangerous Substance with Intent to Distribute and were subsequently convicted on both counts.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

THE SEARCH OF THE SUITCASES IN THE TRUNK OF THE VEHICLE WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION PRINCIPLE OF THE LAW OF SEARCH AND SEIZURE.

The Oklahoma Court of Criminal Appeals held that the officers illegally searched the suitcases found in the trunk of the vehicle, holding that the search fell within the dictates of Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977), rather than those of United States v. Ross, 456 U.S. 798 (1982). The pertinent part of the Opinion of the Oklahoma Court of Criminal Appeals in this regard is as follows:

> "If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. [Citations omitted] . . . If, on the other hand, the officer has

> only probable cause to believe there is contraband in a specific container in the car, he must obtain the container and delay his search until a search warrant is obtained." 678 P.2d at 724; Appendix, infra, 10a.

The Court held that since the suitcases and the Band-Aid box were the "suspected locations" of the contraband, "[t]he officers should have detained the containers until a search warrant had been obtained." 678 P.2d at 724; Appendix, infra, 12a.

The State contends that the ruling of the Oklahoma Court of Criminal Appeals is at odds with that of this Court in United States v. Ross, supra. In Ross, the Supreme Court specifically held that once probable cause is found that a vehicle contains contraband the entire vehicle may be searched without a warrant and "[t]he scope of a warrantless search based on probable cause is

no narrower--and no broader--than the scope of the search authorized by a warrant supported by probable cause." 456 U.S. at 823.

The State submits that the Court of Criminal Appeals erred when it held that officers must procure a search warrant for an automobile when they have knowledge of the suspected location of contraband within a vehicle but are not required to obtain a warrant when they know only that the contraband is somewhere within.

Furthermore, there is no significant distinction than the facts in Ross and the facts in the present case. In Ross, the police were advised by a confidential informant that an individual was selling narcotics kept in the trunk of the car. The facts in the present case set forth previously demonstrate the

abundance of information possessed by Officer Taylor which clearly establish probable cause.

It is important to note that the Court of Criminal Appeals did not adequately set forth their rationale for holding that the suitcases in the trunk were improperly searched. The Court said only that the "officers should have detained the containers until a search warrant had been obtained." 678 P.2d at 724.

The State submits that the holding of the Oklahoma Court of Criminal Appeals with regard to the search of the trunk conflicts not only with United States v. Ross, supra, but established Fourth Amendment law with regard to the automobile exception principle to the general requirement of a search warrant. Cf., Colorado v. Bannister, 449 U.S. 1

(1980); Texas v. White, 423 U.S. 67 (1975); Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

It is not rational to make the distinction between whether a search warrant should be obtained be based upon whether or not the officer had sufficient knowledge to believe that the contraband was in a specific part of a vehicle, as opposed to being in the vehicle generally. As was pointed out in LaFave, Search and Seizure, § 7.2, p. 200 (Supp. 1984), this holding would mean that the police may actually be able to broaden their power to make warrantless searches by revealing less than all their probable cause information. As stated previously, the Oklahoma Court of Criminal Appeals is holding that if the officers had been

advised by the informant only that somewhere in the vehicle there are narcotics they could have searched the vehicle without a warrant, but that by being told by the informant that the narcotics were located in the suitcases they were required to obtain a search warrant.

This rationale clearly goes against the stated desire of this Court that straightforward, workable rules regarding the search of vehicles be formulated to allow police, who have only limited time and expertise, to make decisions regarding the search of vehicles. United States v. Ross, supra; New York v. Belton, 453 U.S. 454, 458 (1981).

Furthermore, in United States v. Ross, supra, the police in that case also had specific knowledge as to the area in which narcotics were to be located, i.e., the trunk. Therefore, if

the reasoning of the Court of Criminal Appeals were used in the Ross case, (since the police knew of the location of the narcotics) they should have been required to obtain a search warrant.

In Michigan v. Thomas, 458 U.S. 259 (1982), this Court again rejected the argument that because a vehicle has been immobilized and the occupants is in custody the police are required to obtain a search warrant for the contents. The clear holding of the Court applies to the present case:

> "In Chambers v. Maroney, 339 US 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in Texas v. White, 423 US 67 (1975). See also United States v. Ross, 456 US 798, 807, n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not

> vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." 458 U.S. at 261.

Since the facts of this case reveal that there was probable cause to believe that the automobile contained narcotics, United States v. Ross, supra, flatly supports the validity of the search of every part of the vehicle and its contents including all containers and packages. United States v. Ross, supra, 456 U.S. at 825. Therefore, the Oklahoma court erred in ruling that the officers should have obtained a search warrant prior to searching the luggage in the trunk of the vehicle.

PROPOSITION II

THE SEARCH OF THE BAND-AID BOX FOUND IN THE FRONT SEAT OF THE VEHICLE WAS JUSTIFIED BOTH AS BEING AN OBJECT OF THE SEARCH UNDER THE AUTOMOBILE EXCEPTION AND AS A SEARCH INCIDENT TO A LAWFUL ARREST.

The Court of Criminal Appeals found that the search of the Band-Aid box, which had been thrown into the vehicle by the Defendant Castleberry as the officer approached with his badge, was illegal and should have been suppressed. The Court stated that since the "suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw in the car," the officers should have detained these containers until a search warrant had been obtained." 678 P.2d at 724. As noted previously, the Court stated that, under their interpretation of Ross, Arkansas v. Sanders, and United States

v. Chadwick, supra, if an officer has probable cause to believe there is contraband in a specific container in a car, he must detain the container and delay his search until a search warrant is obtained. 678 P.2d at 724.

For the reasons stated in Proposition I, the State contends that the holding of this Court in United States v. Ross, supra, is in conflict with this reasoning.

The search of the Band-Aid box should also be upheld based on the search incident to lawful arrest principle of the Fourth Amendment. In New York v. Belton, supra, this Court upheld the search of a jacket found in the backseat of a vehicle belonging to a defendant who along with his three companions were in custody and outside the

vehicle at the time of the search. This Court specifically held:

> "[w]hen a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> "It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U.S. at 460.

Therefore, the State contends that the Defendants Castleberry and Raineri who should not be able to immunize from search a container containing contraband by throwing such into a vehicle when the police approach. The facts of this case present no distinction between those in Belton, supra. The evidence reveals that the Defendant Castleberry was standing right next to the vehicle door

when he threw the box inside. Therefore, the area was obviously within his control at the time of his arrest. Cf., New York v. Belton, supra, (coat found in backseat of vehicle).

CONCLUSION

For the reasons stated, it is respectfully requested that the Petitioner's Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-82-227
No. F-82-228

TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI,
Appellants,

v.

THE STATE OF OKLAHOMA,
Appellee.

[Filed January 23, 1984]

OPINION

BRETT, Judge:

Timothy R. Castleberry and Nicholas Raineri, appellants, were charged with two (2) counts each of possession of a Controlled Dangerous Substance with Intent to Distribute in the District Court of Oklahoma County, Case No. CRF-81-2678. The jury found the appellants guilty on both counts, and

assessed punishment for Raineri at nine (9) years' imprisonment and a fine of five thousand dollars ($5,000) for Count 1 and seven (7) years' imprisonment plus a five thousand dollar ($5,000) fine for Count 2, and, for Castleberry, ten (10) years' imprisonment plus a fine of five thousand dollars ($5,000) for Count 1 and seven (7) years' imprisonment plus a five thousand dollar ($5,000) fine for Count 2. The trial court sentenced the appellants accordingly, additionally ordering the sentences to run concurrently and suspending the fine for Count 2 as to both appellants.

Appellant Castleberry was separately convicted of Possession of a Controlled Dangerous Substance, Cocaine, in Case No. CRF-82-2676 in the Oklahoma County District Court. The trial court sentenced him to eight (8) years' imprison-

ment. The appeals from the judgments and sentences are consolidated since the same factual circumstances are involved in each case.

At approximately noontime on June 9, 1981, Oklahoma City Police Officer R.D. Taylor received a telephone call from a previously unknown confidential informant who told him that two men, one named Castleberry, were staying in Room 113 of a motel in Oklahoma City, driving a blue Thunderbird with Florida license plates and carrying various narcotics in blue suitcases. The informant also gave physical descriptions of the men to the officer.

Officer Taylor proceeded immediately to the location, observed a vehicle matching the informant's description in front of the specified room, and discovered, from the motel clerk, that a

man named Castleberry was registered in that room. He then returned to his car, positioned some five parking spaces from the other vehicle, and waited for back-up assistance to arrive. After several minutes, Officer Taylor observed the appellants emerge from the room and put several suitcases that matched the informant's description into the trunk of the car. At this point, Officer Taylor announced himself as a police officer, approached the car with his badge in one hand and his weapon in the other, and told the appellants to place their hands on the car. Raineri did as ordered, but Castleberry hastily closed the trunk lid and threw a small white object into the car. During a struggle which ensued between Officer Taylor and Castleberry, Castleberry reached up, locked the car door and shut it.

At this point, Officer Citty arrived and opened the trunk of the car with keys Officer Taylor had removed from the door of the car. The officers opened the suitcases, found narcotics and placed the appellants under arrest. Officer Citty then searched the interior of the car and discovered a white Band-Aid box which contained a substance later determined to be cocaine.

Appellants' sole assignment of error is that the trial court erred in overruling their motion to suppress, thereby admitting evidence obtained as a result of an unlawful arrest, search and seizure. The Fourth Amendment of our federal constitution prohibits unreasonable searches and seizures. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are **per se** unreasonable

under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exingencies of the situation made that course imperative. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Thus, it is incumbent on the State to show why the warrantless search of the car and its contents was permissible in the case at bar.

The State first contends that the search was lawful as incident to a lawful arrest. Appellants challenge both the legality of the arrest and the scope of the search.

Although Officer Taylor testified that he did not arrest the appellants until after the suitcases were opened, the appellants were not free to move after the officer advanced toward them with revolver drawn and ordered them to place their hands on the car. This Court has held that when an officer restrains the individual's freedom of movement, that person is under arrest. Wallace v. State, 620 P.2d 410 (Okl. Cr.1980), Castellano v. State, 585 P.2d 361 (Okl.Cr.1978). Under the circumstances, the appellants in the present case were under arrest from the moment Officer Taylor approached them and announced his identity.

Appellants submit that the arrest was unlawful because Officer Taylor did not at that time have probable cause to make it. The Oklahoma statutes allow a

warrantless arrest if the officer has reasonable cause to believe a felony has been committed by the person arrested. 22 O.S.1981, § 196. If at the time of arrest the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that an offense had been or was being committed, probable cause is established and the arrest is lawful. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), Greene v. State, 508 P.2d 1095 (Okl.Cr. 1973).

In this case, appellants argue that the officer had no basis for judging his informant to be reliable or the information trustworthy. We disagree. In Grimes v. State, 528 P.2d 1397 (Okl.Cr. 1974), this Court stated that an

informant's trustworthiness could be established if independent facts within the officer's knowledge corroborated the information. Here, the information was sufficiently corroborated as the only detail not confirmed before the arrest was the presence of narcotics in the suitcases, an allegation Officer Taylor could not lawfully verify before the arrest under the given circumstances.

The search made subsequent to the arrest, however, cannot be justified as a search incident to a lawful arrest, for it far exceeded the permissible bounds of such a search, that is, the area within the arrestee's immediate control from which he might gain possession of a weapon or destructible evidence. See Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Both appellants were re-

strained--one was handcuffed, the other was on the ground with an officer pointing a gun at him--at the time of the search. The car doors and trunk were locked, so once the officer gained possession of the keys, there was no danger of appellants' procuring a weapon or destroying evidence from the interior of the car. A search incident to the arrest would therefore justify neither a search of the locked car nor a search of the suitcases therein.

The State's only other justification offered is that the warrantless search was lawful because the officers had probable cause to believe that narcotics were in the suitcases and exigent circumstances required prompt action. The so-called automobile exception on which the State relies was first recognized in Carroll v. United States, 267 U.S. 132,

45 S.Ct. 280, 69 L.Ed. 543 (1925). Cases subsequent to Carroll caused some confusion about when containers in cars may be searched, but the Supreme Court clarified the law in United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. See United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in

the car, he must detain the container and delay his search until a search warrant is obtained. See United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977).

The Ross court adopted Chief Justice Burger's distinction set out in his concurring opinion to Arkansas v. Sanders. 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), wherein he explained that:

> [I]t was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does

> not turn this into an 'automobile' exception case. The Court need say no more. (Citations omitted). Id., at 766-767, 99 S.Ct. at 2594.

United States v. Ross, 456 U.S. at 813, 102 S.Ct. at 2166-67, 72 L.Ed.2d at 586-87.

The case at bar clearly falls within the Chadwick-Sanders line of cases. The suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw into the car. Accordingly, we hold that the motion to suppress was erroneously overruled. The officers should have detained the containers until a search warrant had been obtained.

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the

> need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whoe job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that th epolice acting on their own cannot be trstued. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 445-456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948).

For the reasons herein stated, the judgments and sentences appealed from should be, and the same are hereby, REVERSED.

CORNISH, J., specially concurs.

BUSSEY, P.J., Dissents.

CORNISH, Judge, specially concurring.

I fully concur in Judge Brett's analysis and application of the Supreme Court's precedents in this case. I would simply note that it has been settled in this State for several years that probable cause will not support a warrantless search in the absence of an emergency, i.e., "exigent circumstances":

> [I]t is without question that the existence of probable cause alone will not satisfy a warrantless search. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Whitehead v. State, 546 P.2d 273 (Okl.Cr.1976). Ordinarily, if an officer has probable cause to make a search, then he should go to a magistrate for a warrant authorizing such a search. Only when there are 'exigent circumstances' in addition to the existence of probable cause may an officer legitimately make a search without a warrant.

Blackburn v. State, 575 P.2d 638, 642 (Okl.Cr.1978).

Absent probable cause to search the entire car, the officers were only authorized to seize the suspect containers and hold them pending issuance of a search warrant. Although probable cause existed with regard to the containers, no exigent circumstances were shown such as to justify a warrantless search.

(2)

No. 83-2126

In The
Supreme Court of the United States
October Term, 1983

THE STATE OF OKLAHOMA,
Petitioner,

vs.

TIMOTHY R. CASTLEBERRY,

and

NICHOLAS RAINERI,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

1. Whether, under the Fourth Amendment, and the dictates of *United States v Ross*, 456 U.S. 798 (1982), a warrant is required to search a specific container in a vehicle, when the police have probable cause to believe the container secrets contraband but no probable cause to believe the vehicle itself contains contraband.

2. Whether the police may search a locked vehicle, parked on a private parking lot, and the containers found inside, as an incident to the lawful arrest of a person standing next to the vehicle but not a recent occupant of said vehicle.

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No. 83-2126

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA COURT OF CRIMINAL APPEALS

Respondents Timothy R. Castleberry and Nicholas Raineri hereby submit the following Brief in Opposition to the Petition for a Writ of Certiorari to the Oklahoma Court of Criminal Appeals filed by Petitioner State of Oklahoma.

STATEMENT OF THE CASE

Although the statement of the case in the Petition contains an essentially accurate review of the facts of the case, the Respondents would supplement that statement with several important facts that were not mentioned. Respondents would refer to the transcripts of the two trials in the same manner as the Petitioner. The transcript of proceedings held on September 1-2, 1981, wherein both respondents were tried for possession of contraband found in the suitcases (F-82-227) will be referred to as Tr. I, and the transcript of proceedings held on September 23-24, 1981, wherein respondent Castleberry was tried for possession of contraband found in the band-aid box (F-82-228) will be referred to as Tr. II.

The arresting officer admitted that he had the situation "under control" at the time back-up officers arrived. (Tr. I, 20). The officer also admitted that at the time of the search of the trunk, both respondents were not close to the trunk and were either on the ground or at the front of the vehicle with their hands upon it. (Tr. I, 21). He further admitted that at the time of the search neither respondents had access to the keys to the vehicle (Tr. I, 21) and at the time of the search he felt no personal jeopardy from the respondents. (Tr. I, 23). The officer further testified that at the time of the searches, neither respondent had any opportunity to get into the car themselves so as to reach a weapon or destroy evidence. (Tr. II, 52).

REASONS FOR DENYING THE WRIT

I. The Opinion Of The Oklahoma Court Of Criminal Appeals Is Just, And Correctly Ruled That The Warrantless Search Of The Locked Suitcases In The Trunk Of The Vehicle Was Not Justified Under The "Automobile Exception" To The Warrant Requirement Of The Fourth Amendment To The United States Constitution.

The Oklahoma Court of Criminal Appeals correctly held that the mere fact that the suitcases in question had been placed in the trunk of a vehicle did not turn this into an "automobile exception" case. It must be remembered that this vehicle was not stopped upon the roadway, but was, instead, parked at all times in a parking lot of a motel and was never mobile; that the vehicle was never occupied by either of the respondents; that the arresting officers had no probable cause to believe that the vehicle itself contained anything illegal, and had such probable cause only as to suitcases; and that the State of Oklahoma failed to prove that there was any "exigency" which required such prompt action as to render a warrant unnecessary.

Contrary to the contention of the Petitioner, the opinion of the Oklahoma Court of Criminal Appeals is entirely consistent with the reasoning pronounced in *United States v Ross*, 456 U.S. 798 (1982). In *Ross*, the Supreme Court undertook a careful examination of the "automobile exception", from its initial recognition in *Carroll v United States*, 267 U.S. 132 (1925), thru its inapplicability in *United States v Chadwick*, 433 U.S. 1 (1977) and *Arkansas v Sanders*, 422 U.S. 753 (1979). Through its opinion in *Ross*, the Supreme Court sought to clarify some of the

confusion surrounding the warrantless search of containers found in automobiles. The Court held that police officers who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed *somewhere* within *it,* may conduct a warrantless search of the vehicle that is as thorough as a magistrate could authorize by warrant, including the warrantless search of any container found in said vehicle. (emphasis added). The "automobile exception" established in *Carroll,* supra, applies when the police have probable cause to believe the vehicle itself contains contraband, but do not know where within the vehicle it is located. The "automobile exception" does not apply, however, to allow the warrantless search of any movable container that is believed to contain contraband and is found in a public place, even if that container is placed in a vehicle, provided that the vehicle is not otherwise believed to be carrying contraband. Thus, the scope of the warrantless search is not defined by the nature of the container in which the contraband is hidden, but rather by the object of the search and places in which there is probable cause to believe that it may be found.

Applying the rationale of *Ross,* supra, to the case at bar, since the police had probable cause to believe that contraband was contained in suitcases, and having no probable cause to believe that contraband was contained elsewhere in the vehicle, the "automobile exception" would not operate to allow the warrantless search of the suitcases because the Respondents had a legitimate expectation of privacy in the closed container protected by the Fourth Amendment to the United States Constitution. It

was the suitcases that the police had probable cause to search, and not the vehicle itself.

The Oklahoma Court of Criminal Appeals quoted Chief Justice Burger's distinction set out in his concurring opinion in *Arkansas v Sanders,* adopted by the *Ross* court, wherein he stated that:

> It was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in *Chadwick.* The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more. (Citations omitted). *Id.,* at 766-767, 99 S. Ct. at 2594.

United States v Ross, 456 U.S. at 813, 102 S. Ct. at 2166-67, 72 L. Ed. 2d at 586-87.

Thus, it is urged that the Oklahoma Court of Criminal Appeals was correct in its application of the principles of *Ross,* supra, to the case at bar, and correctly stated the law when it stated:

> "If the officer has probable cause to believe that there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. (Citations omitted). . . . If, on the other hand, the officer has only probable cause to believe there is contraband in a specific container in the car, he must obtain the container and delay his search until a search warrant is obtained." 678 P.2d at 724

The Petitioner would also argue that there is no significant difference between the facts in *Ross* and the facts

in the case at bar. It is respectively urged that there are several major differences between the facts of the two cases. In *Ross,* the police had probable cause to believe that the *auto* contained contraband, and that same was located in the trunk. (Emphasis added). In the case at bar, the police had probable cause to believe that the *suitcases* contained contraband, and had *no* probable cause as to the vehicle itself. In addition, in *Ross* the police were dealing with a mobile vehicle on the roadway, and because of that mobility, an "exigency" existed which rendered the securing of a warrant impractical. In the present case, the vehicle was never mobile, was never on the roadway, and was never occupied. As the vehicle was in the complete control of the police from the moment of Respondent's arrests, the rationale behind the "automobile exception"—that of exigent circumstances, never existed. There was no compelling reason why the police could not first secure a warrant. As probable cause alone will never satisfy a warrantless search absent the existence of "exigent circumstances", the warrantless search of the suitcases and the interior of the locked vehicle must necessarily fail. *Chambers v Maroney,* 399 U.S. 42 (1970).

The Petition further urges that the opinion by the Oklahoma Court of Criminal Appeals is in conflict not only with *United States v Ross,* supra, but is also in conflict with *Colorado v Bannister,* 449 U.S. 1 (1980), *Texas v White,* 423 U.S. 67 (1975), *Chambers v Maroney,* 399 U.S. 42 (1970), *Carroll v United States,* 267 U.S. 132 (1925), *New York v Belton,* 453 U.S. 454 (1981) and *Michigan v. Thomas,* 458 U.S. 259 (1982). It need only be pointed out, however, that each of the above cases dealt with a legitimate "automobile exception" case where police

were conducting a warrantless search of a *vehicle* based upon probable cause accompanied by the requisite emergency or "exigent circumstances" as to render the procuring of a warrant impractical. All of the cases cited involved searches of mobile vehicles upon the roadway which were occupied immediately prior to the search, and where the police were conducting a search of the entire vehicle. In none of the above cases did the police have probable cause to believe that contraband was contained within a specific container located within the vehicle, as in the case at bar. Thus, it is urged that there is no conflict with the cited cases, as each involved a different factual situation than present in the case before the Court.

In conclusion, therefore, it is respectfully urged that the "automobile exception" to the general warrant requirement of the Fourth Amendment to the United States Constitution does not justify the search of the suitcases.

II. The Search Of The Band-Aid Box Cannot Be Justified As Coming Under The "Automobile Exception" To The General Warrant Requirement Of The Fourth Amendment, Nor As A Search Incident To A Lawful Arrest.

It is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . . subject only to a few specifically established and well-delineated exceptions". *Katz v United States,* 389 U.S. 347 (1967). It is also settled that the fundamental purpose of the Fourth Amendment is to safeguard individuals from unreasonable government invasions of legitimate privacy interests, "and not simply those interests found inside the four walls of the home". *Wolf*

v Colorado, 338 U.S. 25, 27 (1949). Thus, the safeguards embodied in the warrant requirement of the Fourth Amendment apply as forcefully to automobile searches as to any others. While the United States Supreme Court has recognized certain narrow exceptions to the warrant requirement for certain automobile searches, the "search incident to a lawful arrest" and the "automobile exception", the Court has upheld only those searches that were actually justified by the reasons for those exceptions.

The first judicially recognized exception to the warrant requirement for automobiles was set out in *Chimel v California,* 395 U.S. 752 (1965), wherein the Supreme Court approved a warrantless search "incident to a lawful arrest". According to *Chimel,* supra, the area that can be lawfully searched is limited to that area "within the arrestee's immediate control", from which the arrestee "might gain possession of a weapon or destructable evidence". Such an area might also be defined as that area within the arrestee's "grabbing distance". To determine if the search at bar was lawful as incident to a lawful arrest, one must assume that the arrest itself was lawful, and then proceed to apply the facts at bar to two separate inquiries:

At the *very moment of the search:*

1) *What places would it be possible for the arrestee to presently reach?*

In determining what places the arrestee could possibly reach, one must look at several considerations. Was the arrestee restrained to an extent that would prohibit him from reaching the area subsequently

searched? In the case at bar, both arrestees were restrained at the time of the search of both the suitcases and the interior of the locked automobile. Both were either handcuffed or on the ground with officers holding weapons on them; both the trunk and the interior of the auto were locked, with the police having possession of the keys; the police were positioned between the arrestees and the automobile; gaining access to the containers searched was virtually impossible because they were inside the locked vehicle and some were locked themselves; and the police had total control of the area to be searched to the exclusion of the arrestees. It is thus submitted that the items searched, the band-aid box locked in the interior and the suitcases locked inside the trunk, were not in areas that the arrestees had any possibility of presently reaching at the time of the search, and thus not within the immediate control of the arrestees. Having made that first inquiry, we must look at the facts at bar to determine:

2) *How probable is it that the arrestees would undertake to seek means of resistance or destroy evidence?*

In the case at bar, the police had no prior information that the arrestees were armed or dangerous, and the crime for which they were arrested did not involve weapons. In addition, the nature and type of evidence inside the containers searched does not lend itself to ready destructability. It would be very unlikely that the arrestees could destroy a large amount of various drugs locked inside a car while watched over by armed officers, particularly when handcuffed and ly-

ing on the ground. In addition, the arrestees made no furtive gestures which would indicate any intention of reaching for weapons or destroying evidence. To the contrary, the movements of the arrestee in closing the trunk and locking the door would operate to make any such attempt even more unlikely.

Having made these two inquiries, it can be seen that the arrestees would have to have been "possessed of the skill of Houdini and the strength of Hercules" for the areas searched to be considered within their immediate control, and thus justify a warrantless search as incident to a lawful arrest. *United States v Frick,* 490 F.2d 666 (5th Cir. 1973). It is respectfully submitted that the Respondents were not so possessed at the time of the searches and that any attempt to justify the warrantless searches on the basis of the *Chimel* exception must fail. The Oklahoma Court of Criminal Appeals, it is urged, was correct in stating:

> "The search made subsequent to the arrest, however, cannot be justified as a search incident to a lawful arrest, for it far exceeded the permissible bounds of such a search, that is, the area within the arrestee's immediate control from which he might gain possession of a weapon or destructable evidence. (Citation omitted) Both appellants were restrained,—one was handcuffed, the other was on the ground with an officer pointing a gun at him—at the time of the search. The car doors and trunk were locked, so once the officer gained possession of the keys, there was no danger of appellants' procuring a weapon or destroying evidence from the interior of the car. A search incident to the arrest would therefore justify neither a search of the locked car nor a search of the suitcases therein." 678 P.2d at 723.

The Petitioner argues that the Oklahoma Court of Criminal Appeals' opinion is in conflict with *New York v Belton,* 453 U.S. 454 (1981). However, a close examination of the facts in both cases reveals that the cases are not similar. In *Belton,* the automobile was stopped on the roadway for speeding, and the arrestee was an occupant of the vehicle. The vehicle in *Belton* was not locked and was mobile. As the Court stated in *Belton*:

> "when a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U.S. at 460.

In the case at bar, however, the automobile was never mobile, as it was locked and parked in a private parking lot. The arrestees were not "recent occupants" of the vehicle, and, as distinguished from *Belton,* the passenger compartment, as well as the containers therein, were not within the reach of the arrestees at the time of the arrest and search. Thus, the search of the band-aid box located in the interior of the locked vehicle, to which the arrestees had no keys, cannot be justified as an "incident to a lawful arrest".

The Petitioner also advances the proposition that the search of the band-aid box can be justified as coming within the "automobile exception" to the general warrant requirement of the Fourth Amendment to the United States Constitution. As stated earlier, the "automobile excep-

tion" has been recognized as authorizing warrantless searches of vehicles under certain, narrowly defined circumstances, but it is urged that the facts of the case at bar do not justify the search of the band-aid box under the "automobile exception". As discussed in the previous section dealing with the search of the suitcases, the placing of the band-aid box in the vehicle does not, in itself, make this an "automobile exception" case.

Again, the police had no probable cause to search the vehicle itself, nor any probable cause to search the band-aid box, as their probable cause information concerned itself only with suitcases. In addition, the rationale behind the "automobile exception" requires that the vehicle be mobile on the roadway, not parked and locked, and requires the presence of some emergency or "exigency" which makes the securing of a warrant impractical under the circumstances. In the case at bar, there was no showing of any "exigent circumstances", and if any probable cause existed to search, it ran to the band-aid box itself and not to a warrantless search of the vehicle. It is urged, therefore, that this is simply not an "automobile exception" case, and that said exception will not justify the warrantless search of the locked interior of the automobile, nor the band-aid box found therein.

III. The Oklahoma Court Of Criminal Appeals Opinion Is Not In Conflict With Any Decisions Of The United States Supreme Court, And Review Of Said Opinion Is Unwarranted.

The opinion of the Oklahoma Court of Criminal Appeals in the case at bar is entirely consistent with the United States Supreme Court's decisions in *United States*

v Ross, 456 U.S. 798 (1982), *Arkansas v Sanders,* 442 U.S. 753 (1979), *United States v Chadwick,* 433 U.S. 1 (1977), *Carroll v United States,* 267 U.S. 132 (1925), as well as *Michigan v Thomas,* 458 U.S. 259 (1982), *New York v Belton,* 453 U.S. 454 (1981), *Chambers v Maroney,* 399 U.S. 42 (1970), and *Chimel v. California,* 395 U.S. 762 (1969), and no compelling justification exists to alter the prevailing law as set forth in those decisions.

—o—

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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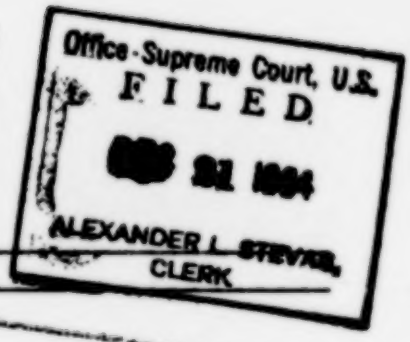

No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF OKLAHOMA
Petitioner,
v.
TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI
Respondents.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF OF PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under the Fourth Amendment principles set forth in United States v. Ross, 456 U.S. 798 (1982), when an officer has probable cause to believe that there is contraband in a specific container in a vehicle, and probable cause exists to support a search of the entire vehicle, he is required to obtain a search warrant for the vehicle and the compartments and containers therein.

2. Whether, when officers arrest a suspect on probable cause, and the suspect, who is standing next to the vehicle, is able to place a container inside a vehicle, the police may search the container as a search incident to arrest or pursuant to the automobile exception rule.

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BRIEF OF PETITIONER

OPINION BELOW

The decision of the Oklahoma Court of Criminal Appeals from which the certiorari is sought is reported as Castleberry v. Oklahoma, 678 P.2d 720 (Okl.Cr. 1984). This Opinion was filed on January 23, 1984, and the State of Oklahoma's (hereinafter referred to as "the State") Petition for Rehearing was denied on April 5, 1984. The Court's mandate was issued on April 11, 1984.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Nicholas Raineri (hereinafter referred to as the "Defendant Raineri") and Timothy R. Castleberry (hereinafter referred to as the "Defendant Castleberry"), were both convicted after a jury trial on two counts of Possession of a Controlled Dangerous Substance With Intent to Distri-

bute, Okla. Stat. Ann., tit. 63, § 2-401 in the District Court of Oklahoma County, State of Oklahoma. The Defendant Castleberry was also convicted in a subsequent jury trial for the offense of Possession of a Controlled Dangerous Substance, Okla. Stat. Ann., tit. 63, § 2-402.

The Defendant Raineri was sentenced to nine years imprisonment and a $5,000.00 fine on Count 1 and seven years imprisonment and a $5,000.00 suspended fine on Count 2. The Defendant Castleberry was sentenced to ten years imprisonment and a $5,000.00 fine on Count 1 and seven years imprisonment and a $5,000.00 suspended fine on Count 2. The Defendant Castleberry was sentenced to eight years imprisonment on the separate charge of Possession of a Controlled Dangerous Substance.

The two cases were consolidated on appeal and the convictions of both Defen-

dants were reversed in a decision of the Oklahoma Court of Criminal Appeals reported at 678 P.2d 720 (Okl.Cr. 1984) (A. 27).

The facts presented at trial revealed that at approximately noontime on June 9, 1981 (Tr. I, 6),[1] Officer R.D. Taylor of the Oklahoma City Police Department, Narcotics Division (Tr. I, 5), received a telephone call from an informant, previously unknown to him but referred by a fellow police officer (Tr. I, 18). The informant advised him that the informant had seen a large quantity of marijuana, some cocaine, and white pills in Room 113 at the Southgate Inn, a motel located on Interstate 35 in Oklahoma City. The

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[1] The following transcript designations will be used: Tr. I - Transcript of proceedings held on September 1-2, 1981 (F-82-227) (trial of the Defendants Castleberry and Raineri); Tr. II - Transcript of trial proceedings held on September 23-24, 1981 (F-82-228) (trial of the Defendant Castleberry).

informant told Taylor that he or she had been in the room within the past ten hours (Tr. I, 18). The informant gave the officer a description of the men in the room and of the suitcase containing some of the narcotics. The informant also told the officer that one of the men was Tim Castleberry and the other was named Nick. The officer was also informed that they were driving a 1980 or 1981 blue Thunderbird with Florida license plates (Tr. I, 6-7).

Officer Taylor immediately drove to the location. He drove through the parking lot and observed a blue 1980 or 1981 Thunderbird with Florida license plates parked immediately in front of Room 113. Taylor parked his vehicle approximately five parking spaces away from the Thunderbird and went to see the desk clerk. After advising her that he was a police

officer, he inquired as to who was staying in Room 113 (Tr. I, 7). The desk clerk stated that it was registered to a Tim Castleberry, that he had paid only for the previous night and that checkout time was at 1:00 p.m. (Tr. I, 8). It was approximately 12:50 p.m. at this time (Tr. I, 18).

The officer returned to his car and waited (Tr. I, 8). He had previously cal' d for assistance (Tr. I, 7). After waiting five or ten minutes, Officer Taylor observed the Defendant Castleberry exit the motel room carrying a baby blue leather suitcase (Tr. I, 8), and place it in the trunk of the car. This suitcase matched the description of one given by the informant which the informant stated contained some of the drugs (Tr. I, 6,8, 12,26).

Castleberry left the trunk open and the Defendant Raineri came out carrying two plaid suitcases, which were also placed in the trunk. Then a young male came out and went to a red car parked next to the Thunderbird. The Defendant Castleberry returned with another blue suitcase, which he placed in the backseat of his vehicle.

After inquiring about his backup, Officer Taylor approached the car while the door and the trunk were still open (Tr. I, 9). Taylor testified that he could detect the smell of marijuana coming from the trunk (Tr. I, 11). All three men were standing outside. He held his badge in one hand and his service revolver in the other, advised the men he was a police officer, and ordered them to place their hands on the car.

The Defendant Raineri placed his hands on the vehicle as ordered (Tr. I, 10), but the Defendant Castleberry, after closing the trunk of the car, reached behind his back. The officer asked him twice to place his hands on the car but Castleberry refused to do so. Finally, the Defendant Castleberry threw something from behind his back into the car (Tr. I, 11). Officer Taylor then attempted to physically force the Defendant Castleberry to place his hands on the car, but eventually had to wrestle him to the ground.

While on the ground, the Defendant Castleberry reached up, locked the car door, and closed it. The car keys remained in the car door.

At this time, with the situation under control, Officer Taylor's partner, Officer Bill Citty arrived. Officer Taylor gave Officer Citty the car keys, told

him he had smelled marijuana coming from the trunk, and asked him to open the trunk. The Defendant Raineri was at the passenger side of the car with his hands on top, and the Defendant Castleberry was laying on the ground with his head next to the left rear tire (Tr. I, 21). Officer Citty opened the trunk and also smelled "a very strong odor" of marijuana (Tr. I, 26). Officer Citty opened the plaid suitcases and found that they were filled with marijuana (Tr. I, 12,26). Officer Taylor then advised the men that they were under arrest (Tr. I, 12,26).

Taylor then told Citty that the informant had told him that "there was a large amount of powder" in the blue suitcase and that he wanted Citty to check it (Tr. I, 26). Officer Citty then broke open the blue leather suitcase and found that it contained a large sum of cash and

a clear plastic baggy containing approximately ten ounces of white powder (Tr. I, 12,27). The powder was later determined to be methaquaalone powder (Tr. I, 37).

Officer Citty then opened the car door and searched the interior (Tr. II, 13). In that search, he found a white Band-Aid box on the dashboard of the vehicle which contained approximately an ounce of white powder (Tr. II, 14,59-60). This white powder was later determined to be cocaine (Tr. II, 68).

SUMMARY OF ARGUMENT

In the present case, if the facts known to Officer Taylor when he approached the Defendants had been presented to a magistrate, a search warrant based upon probable cause would have been issued for the search of the automobile. Therefore, under the principles of United States v.

Ross, 456 U.S. 798 (1982), all containers and compartments in the vehicle could have been searched without a search warrant pursuant to the "automobile exception" rule. This search would include the luggage in the trunk and the Band-Aid box in the passenger compartment.

The fact that the officers knew of the specific location of some of the narcotis should not mean that they were required to obtain a search warrant for the containers or compartments concealing such. A rule such as this would inject a great amount of uncertainty into what is at the present time a workable, straightforward rule regarding searches of automobiles.

The present case differs from that in Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977) in that in those cases the only

potential location of the narcotics was the suitcase and footlocker, and not a vehicle which might have been transporting such. In Arkansas v. Sanders, supra, there was no reason to believe that the taxicab which was carrying the suitcase was a possible repository for narcotics and therefore, the fact that the suitcase was merely resting in the automobile taxicab did not give rise to the "automobile exception" justification for the search.

In the present case, however, there was probable cause to believe that drugs had been moved from the motel room where they had been seen by an informant to the vehicle parked outside the motel room. The fact that information provided by the informant was that he or she had seen "some" of the drugs in a suitcase (implying that the rest of the drugs were in

other places in the room), that the Defendants' were in the process of loading their automobile at check-out time, that the automobile had Florida licenses plates on it, that the Defendants wee staying at a motel located on a major interstate highway, that the Defendant Castleberry threw an object into the car when approached by Officer Taylor and subsequently locked the car, is part of the evidence which supports the view that the vehicle, as a whole, was the "suspected locus" of the object of the search. The relationship between the objection of the search and the vehicle in Sanders and Chadwick was purely coincidental. Here, the relationship between the vehicle and the object of the search is apparent.

The additional intrusions into the contents of the luggage and the Band-Aid box were minimal when viewed in the con-

text of the right of the police to arrest and search the person and effects of the Defendants and impound and search their vehicle. The interests of the public in clear rules and efficiency in the allocation of police resources are also considerations when determining whether a search warrant should have been obtained in the present case.

ARGUMENT

PROPOSITION I

THE SEARCH OF THE SUITCASES IN THE TRUNK OF THE VEHICLE WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION PRINCIPLE BECAUSE A MAGISTRATE WOULD HAVE BEEN JUSTIFIED IN ISSUING A SEARCH WARRANT AUTHORIZING THE SEARCH OF THE ENTIRE VEHICLE SINCE PROBABLE CAUSE WOULD SUPPORT THE BELIEF THAT THE VEHICLE CONTAINED CONTRABAND.

The Oklahoma Court of Criminal Appeals held that the officers illegally searched the suitcases found in the trunk of the vehicle, finding that the search

fell within the dictates of Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977), rather than those of United States v. Ross, 456 U.S. 798 (1982). One of the pertinent parts of the Opinion of the Oklahoma Court of Criminal Appeals in this regard is as follows:

> "If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. [Citations omitted] . . . If, on the other hand, the officer has only probable cause to believe there is contraband in a specific container in the car, he must obtain the container and delay his search until a search warrant is obtained." 678 P.2d at 724; A. 34.

The Court held that since the suitcases and the Band-Aid box were the "suspected locations" of the contraband, "[t]he officer should have detained the containers until a search warrant had been obtained." 678 P.2d at 724; A. 36.

The State contends that the ruling of the Oklahoma Court of Criminal Appeals is at odds with that of this Court in United States v. Ross, supra. In Ross, the Supreme Court specifically held that once probable cause is found, a vehicle may be searched without a warrant and "[t]he scope of a warrantless search based on probable cause is no narrower--and no broader--than the scope of the search authorized by a warrant supported by probable cause." 456 U.S. at 823.

The facts of the present case are such that a magistrate would have issued a search warrant for the search of the Defendants' entire vehicle. Officer Taylor had been advised that a man named Tim Castleberry and another man named Nick were in possession of a large quantity of marijuana, some cocaine and "some other white pills" (Tr. I, 6). The informant

had been in the room within the past ten hours (Tr. I, 18). Officer Taylor was given a physical description of the Defendants, the motel and room number where they were staying, and of the suitcase that "some of the narcotics [were] in" (Tr. I, 6). The informant also told him that the Defendants were driving a late model 1980 or 1981 blue Thunderbird with Florida tags (Tr. I, 5-6).

The information was fully corroborated when Officer Taylor arrived at the motel. When he drove through the parking lot he observed a blue 1980 or 1981 Thunderbird with Florida license plates parked "immediately" in front of the room specified by the informant (Tr. I, 7). The motel clerk confirmed that the room referred to by the informant was registered to a Tim Castleberry (Tr. I, 7-8).

After returning to his car and waiting appropriately five or ten minutes, Taylor observed Defendant Castleberry leave the motel room carrying a blue suitcase which matched the description of the suitcase that the informant had stated contained "some" of the narcotics (Tr. I, 6,6,12,26). Castleberry placed this suitcase in the trunk of the Thunderbird. The Defendant Raineri loaded two plaid suitcases into the trunk and Castleberry returned with another blue suitcase, which he placed in the backseat of the car (Tr. I,9).

Officer Taylor had also been advised by the motel clerk that the Defendant Castleberry had paid for only one night and that check-out time was 1:00 p.m. Taylor arrived at the motel at approximately 12:50 p.m. (Tr. I, 18).

Armed with this information, Officer Taylor approached the Defendants with his gun drawn and his badge displayed, advising them that he was a police officer and to put their hands on the car (Tr. I, 10). As he approached the trunk he could detect the odor of marijuana (Tr. I, 11). The Defendant Raineri complied with this command, but Castleberry, after closing the trunk, placed his hands behind his back and ignored two requests from Taylor to take his hands from behind his back and place them on the car (Tr. I, 11). Castleberry then threw an object into the car (Tr. I, 11). Officer Taylor then attempted to force Castleberry to place his hands on the car, and in the process had to wrestle him to the ground. Castleberry then reached up, locked the car door and closed it (Tr. I, 11).

The State submits that, based upon this information, a magistrate would have found probable cause to believe that the vehicle contained contraband and would have been justified in issuing a search warrant allowing the police to search the entire car.

The evidence points to the fact that the vehicle was a repository for narcotics. Officer Taylor observed the car being loaded with luggage when he arrived. Check out time was at hand. The informant had seen various types of drugs in Room 113, including marijuana, cocaine and what were described as "white pills" (Tr. I, 6). At least one of the suitcases matched the description of one which contained "some" of the drugs (Tr. I, 6,8,12,26).

Other facts known to Officer Taylor are also important. Defendant Castleberry threw an object into the car when ap-

proached by a law enforcement officer. The car was parked at a motel located on a major interstate highway and was displaying Florida license plates.[2] All of this would lead a reasonable person to conclude that drugs were being removed from the motel room to the car. Certainly a magistrate would find that, at the very least, probable cause existed to believe that narcotics were being "concealed" in the vehicle. Carroll v. United States, 267 U.S. 132, 153 (1925).

It is significant that the informant had advised Officer Taylor that "some" of the narcotics had been in a blue suitcase.

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[2] In Illinois v. Gates, 103 S.Ct. 2317, 2334 (1983) the Supreme Court stated that the fact that the defendants' automobile traveled from Florida to Illinois supported the belief that it contained drugs, noting that "Florida is well-known as a source of narcotics and other illegal drugs."

Therefore, this case is distinguishable from the situations in Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977), where the information indicated that all of the contraband was in one container. In the present case, contraband could have been concealed in any of the suitcases, the object thrown into the car, or any other containers or compartments in the vehicle where drugs could have been placed after their removal from the motel room. It is also important to remember that Officer Taylor testified that he detected the odor of marijuana coming from the trunk as he walked up to the vehicle, which means that marijuana could have been stored in any compartment or container in the trunk.

As previously noted, the Oklahoma Court of Criminal Appeals based their

holding on the reasoning that if officers know specifically in what container contraband may be located, a search warrant must be issued before the container is searched. The State believes that this was an incorrect and narrow reading of United States v. Ross, supra, Arkansas v. Sanders, supra, and United States v. Chadwick, supra, and is inconsistent with other Supreme Court cases dealing with the automobile exception as well.

In Ross the police were told by the informant the specific location where the drugs were located, i.e., the trunk. 456 U.S. at 800. Despite that fact, this Court did not require that the police obtain a search warrant for the trunk.

In Colorado v. Bannister, 449 U.S. 1 (1980) the police obviously knew of the exact location of items which they seized, lug nuts and lug wrenches, since

the police observed those items in plain view in the glove compartment and on the floorboard of the back seat. This Court held that the Colorado Supreme Court was incorrect in holding that a search warrant should have been obtained, applying the automobile exception principles of Carroll. See also Texas v. Brown, 460 U.S. 730 (1983) where facts similar to Bannister existed although the warrantless seizure and subsequent search was upheld under the plain view doctrine.

In Texas v. White, 423 U.S. 67 (1975) the police knew of the location of the items they were seeking since a bank employee observed the defendant "stuff something" between the seats of his automobile. Nothing in the Court's opinion suggested that the police should have obtained a search warrant for the location where the suspected fruits or instrumentalities of the crime were hidden.

In Chambers v. Maroney, 399 U.S. 42 (1970) this Court upheld the warrantless search of a glove found in an automobile even though they presumably may have known that the glove contained change taken during a robbery since one of the robbers had directed the victim to place coins in the glove. Obviously, the Court did not hold that the police should have obtained a search warrant for the glove.

The clear holding of United States v. Ross, supra, is that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justified the search of every part of the vehicle and its contents that may conceal the object of the search." 456 U.S. at 825. If the police have an idea that certain compartments or containers conceal items they are searching for (in this case the blue suitcase) they should not be required to obtain a search

warrant for an automobile if probable cause exists to believe that contraband may be hidden in other parts of the automobile. In Ross, the Court stated that "[a] warrant to support a search of the vehicle would support a search of every part of the vehicle that might contain the object of the search." 456 U.S. at 821.

It is the State's view that Officers Taylor and Citty had probable cause to believe that contraband could be concealed in the automobile generally and that the "automobile exception" rule should apply in the present case. The fact that the informant had not been used by Officer Taylor previously (although the informant had been referred to him by another police officer) is merely a factor to be weighed in the "totality of circumstances." See Illinois v. Gates, supra, where an anonymous letter was sufficiently corroborated

by other police information. In the present case, the State has previously mentioned the observations of Officer Taylor which corroborated the informant's information, as well as the fact that the vehicle possessed Florida tags and was parked at a motel located on Interstate Highway 35.

Furthermore, the refusal of Castleberry to cooperate with the officer's commands, (which were issued with the assistance of a drawn gun), followed by Castleberry's disposing and locking up of an object he was hiding behind his back, surely reflect a consciousness of guilt. In a concurring opinion in Illinois v. Gates, supra, Justice White stated that "the proper focus should be on whether the actions of the suspects, whatever their motive, give rise to an inference that the informant is credible and obtained his

information in a credible manner." 103 S.Ct. at 2348. Justice White also noted in his concurring opinion in Spinelli v. United States, 393 U.S. 410, 427 (1969):

> "Because an informant is right about some things, he is more probably right about other facts."

In Texas v. Brown, supra, the Supreme Court observed that "probable cause is a flexible, common-sense standard" and that "it does not demand any showing that such a belief be correct or more likely true than false." 460 U.S. at 742. It was further noted that "[a] 'practical, non-technical' probability that incriminating evidence is involved is all that is required.' Brinegar v. United States, 338 U.S. 160, 176 (1949)." The Court then quoted from United States v. Cortez, 449 U.S. 411, 448 (1981), as follows:

> "The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities

> was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same-and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement."

In Illinois v. Gates, supra, it was stated:

> "As these comments illustrate, probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts-not readily, or even usefully, reduced to a neat set of legal rules. Informants' tips doubtless come in many shapes and sizes from many different types of persons. . . . 'Informants' tips, like all other clues and evidence coming to a policeman on the scene may vary greatly in their value and reliability.' Rigid legal rules are ill-suited to an area of such diversity. 'One simple rule will not cover every situation.'" (Citation omitted). 103 S.Ct. at 2328-2329.

A rule that would require police to obtain a warrant when they knew of the locality of the object in an automobile

would cause much confusion in an area which the Court in Ross referred to as "this troubled area." 456 U.S. at 817. Instead of the straight-forward rule of Ross, which looks to the overall existence of probable cause to search a vehicle and its compartments and containers, endless litigation over whether the officer knew of the location of the contraband or fruits or instrumentalities of a crime would be inevitable.

This Court has repeatedly stressed the need for rules that are clear and are therefore, easy to apply uniformly. United States v. Ross, supra, 456 U.S. at 803-804. In New York v. Belton, 453 U.S. 454 (1981) the Supreme Court quoted Dunaway v. New York, 442 U.S. 200, 213-214 (1979) as follows:

> "'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance

> the social and individual interests involved in the specific circumstances they confront.'" 453 U.S. at 458.

The need for straightforward and predictable rules is in the interest of both the police and the citizens who may be subjected to police activity. New York v. Belton, supra, 453 U.S. at 459-460.

Further evidence of the inappropriateness of a rule permitting an automobile container or compartment search depending upon whether the officer knew the specific location within the automobile of the object of the search is the fact that it holds the potential for a police officer to be able to broaden his or her authority to make warrantless searches by revealing less than all of their probable cause information. See LaFave, Search and Seizure, § 7.2, p. 200 (Supp. 1984).

The exclusionary rule already has several built-in aspects that are in opposition to a system of criminal justice supposedly based upon a search for truth in the assigning of guilt or innocence:[3] (1) the suppression of evidence that is directly relevant to the guilt of the person accused of an offense against society; (2) the fact that police who lie with regard to where evidence was found are rewarded with the admission of the evidence whereas those officers who tell the truth are punished by the suppression of the evidence and possibly the release of the criminal; and (3) the award of freedom to a criminal based upon conduct

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[3] In United States v. Leon, 104 S. Ct. 3405, 3409 (1984) the Court noted that there existed a tension between the exclusionary rule and procedures "under which criminal defendants are 'acquitted or convicted on the basis of all of the evidence which exposes the truth.'"

of an officer and not upon the free will decision of an individual to commit or not to commit the crime, in other words, the separation of the relationship between choice, and responsibility for that choice.

If the reasoning of the Court of Criminal Appeals is upheld, therefore, another mechanism at odds with the search for the truth would exist, as an officer who withholds facts which give him knowledge of the exact location of the object of the search would be rewarded by being allowed to search the entire vehicle without search warrant whereas full disclosure of his knowledge would mean that he would be required to take the time and trouble to acquire one.

The disadvantages of the exclusionary rule generally have been thoroughly discussed by this Court. United States v.

Leon, 104 S.Ct. 3405, 3412-3416 (1984); Stone v. Powell, 428 U.S. 465 (1976); Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 412-421 (1971) (Burger, C.J. dissenting). The applicability of the rule varies with the interests of the individual in a particular type of case and the interests of the public. I.N.S. v. Lopez-Mendoza, 104 S.Ct. 3479 (1984); United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, supra; United States v. Calandra, 414 U.S. 338 (1974).

Whether the exclusionary sanction is appropriately imposed in a particular case generaly "must be resolved by weighing the costs and benefits of preventing the use in the prosecutor's case-in-chief of inherently trustworthy tangible evidence . . . ." United States v. Leon, supra, 104 S.Ct. at 3412. Exceptions to the general rule requiring search warrants exist

because the Court has found that "societal costs of obtaining a warrant . . . outweigh the reasons for prior recourse to a neutral magistrate." Arkansas v. Sanders, supra, 442 U.S. at 759.

In United States v. Place, 103 S.Ct. 2637, 2642 (1983) the Court stated that it was necessary to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." In United States v. Jacobsen, 104 S.Ct. 1652, 1661 (1984) the Supreme Court found that the "additional intrusion" occasioned by a field test of cocaine after a container had previously been opened by private persons did not violate the Fourth Amendment.

The Court has held that there is a "dimmished expectation of privacy" when

one places his or her personal effects into an automobile. United States v. Chadwick, 433 U.S. 1, 12 (1977). For example, the "configuation, use and regulation of automobile often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." Arkansas v. Sanders, supra, 442 U.S. at 761.

Furthermore, when a person leaves the privacy of his or her home and transports items of personal property in an automobile, constitutional protections cannot be expected to be the same. One who travels in an automobile is subject to being stopped for an infinite number of reasons. Delaware v. Prouse, 440 U.S. 648 (1979); Texas v. Brown, supra, 460 U.S. at 733. Additionally, activities undertaken in an automobile are not generally private in

nature.[4] As was observed in Segura v. United States, 104 S.Ct. 3380, 3389 (1984):

> "But the home is sacred in Fourth Amendment terms not primarily because of the occupants ' possessory interests in the premises, but because of their privacy interests in the acitivities within." (Emphasis original).

While the Fourth Amendment is obviously designed to protect against infringements upon personal freedom in the form of both invasions into expectations of privacy and interference with property interests, see United States v. Jacobsen, 104 S.Ct. 1652, 1656 (1984), the balancing of these interests against the requirement that a police officer be required to obtain a search warrant from a magistrate

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[4] Cf. Welsh v. Wisconsin, 104 S.Ct. 2091, 2094 (1984) and Payton v. New York, 445 U.S. 573, 578 (1980) where police invasions of residences intruded upon individuals while they were in personal circumstances.

prior to searching containers located in an automibile demands that the entire circumstances of a particular case be examined. Obviously, administrative considerations are relevant to this determination. In Robbins v. California, 453 U.S. 420, 433-434 (1981). Justice Powell observed in his concurring opinion:

> "Confronted with a cigarbox or a Dixie cup in the course of a probable-cause search of an automobile for narcotics, the conscientious policeman would be required to take the object to a magistrate, fill out the appropriate forms, await the decision, and finally obtain the warrant. Suspects or vehicles normally will be detained while the warrant is sought. This process may take hours, removing the officer from his normal police duties. Expenditure of such time and effort, drawn from the public's limited resources for detecting or preventing crimes, is justified when it protects an individual's reasonable privacy interests. In my view, the plurality's requirement cannot be so justified. The aggregate burden of procuring warrants whenever an officer has probable cause to search the most trivial container may be heavy and will not be compensated by the advancement of important Fourth Amendment values."

The State contends that in the present case, the additional intrusion into the Defendants' privacy interests caused by the immediate search of the luggage found in the automobile is outweighed by the need for clear rules governing searches of automobiles and the freedom from the practical inconvenience necessitated by the warrant procedure every time justification exists for the search of a container or compartment in a vehicle.

This is particularly true in light of the restraints and invasions an individual who is driving an automobile is subjected to when there is probable cause to believe that a container or compartment within such is concealing contraband or the fruits or instrumentalities of a crime. That person can be immediately and publicly arrested without a warrant.[5] He can

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[5] United States v. Watson, 423 U.S. 411 (1976).

then be handcuffed, placed in a police car, and taken to the police station. He can then be mugged, fingerprinted,[6] and booked. He can be subjected to a complete search of his person[7] and any personal effects carried with him can be fully searched, examined and inventoried.[8] His clothing can be taken from him, searched, and kept in "official custody."[9] In appropriate cases, his fingernails can be

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[6] Davis v. Mississippi, 394 U.S. 721 (1969).

[7] United States v. Robinson, 414 U.S. 218 (1978).

[8] Illinois v. Lafayette, 103 S.Ct. 2605 (1983).

[9] United States v. Edwards, 415 U.S. 800 (1974).

scraped,[10] his blood can be taken[11] and he can be placed in a lineup.[12]

With regard to his automobile, the entire passenger compartment can be searched[13] and the car can be seized, towed-in, and impounded.[14] If undertaken pursuant to standard police procedure, the entire automobile and its contents can be searched and inventoried.[15]

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10 Cupp v. Murphy, 412 U.S. 291 (1973).

11 Schmerber v. California, 384 U.S. 757 (1966).

12 Kirby v. Illinois, 406 U.S. 682 (1972).

13 New York v. Belton, 453 U.S. 454 (1981).

14 Chambers v. Maroney, 399 U.S. 42, 51 (1970).

15 South Dakota v. Opperman, 428 U. S. 364 (1976).

Therefore, in this context, the "additional intrusion" into an individual's privacy and property interests is outweighed by the previously mentioned public interests-clear search and seizure guidelines for the protection of the police and public alike, the efficient use of police resources which would be diluted by the requirement of a search warrant, and the compelling reasons why a criminal proceeding should be allowed to receive evidence directly related to the truth. At this point a defendant's privacy interests are minimal and the only function of the warrant requirement is to remove police from their crime prevention and detection responsibilities and to provide defense attorneys with a tool to thwart the admission of evidence constituting the most conclusive proof of the defendant's guilt.

Furthermore, it has previously pointed out that "[t]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit." United States v. Mendenhall, 446 U.S. 544, 561 (1980) (Powell, J., concurring). In United States v. Place, supra, 104 S.Ct. at 2643, the Court stated that it would weigh the "strong governmental interest" in preventing the flow of narcotics into distribution channels "against the nature and extent of the intrusion upon the individual's Fourth Amendment rights. . . ."

Additionally, if the police are allowed to make an immediate search of the containers in a vehicle, the guilt or innocence of the person under suspicion is quickly determined. Instead of being subjected to an arrest and the attendant indignities pending the obtaining of a

search warrant, a suspect whose baggage is searched on the scene and found not to possess objects of the search can be immediately released, his effects promptly returned, and the impoundment of his automobile avoided.[16]

Further evidence of the gamesmanship inherent in juggling the various theories used to justify a search of an automobile is that, in the present case, if Officers Taylor and Citty had merely termed their search an "inventory" search, it presumably could have been upheld on this basis if undertaken pursuant to an established police policy. South Dakota v. Opperman, supra. It is difficult to imagine how privacy interests in the contents of the

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[16] In Segura v. United States, supra, 104 S.Ct. at 3387, the Court noted that in Chambers v. Maroney, supra, "it was reasonable to seize and impound an automobile, on the basis of probable cause, for 'whatever period is necessary to obtain a warrant for the search.'"

luggage can be viewed as being important if they are dependent solely upon the particular label selected by the police which defines their state of mind at the start of the search. Additionally, scenarios which have results dependent upon semantics such as this cannot help but increase public and police cynicism toward the entire process and undermine respect for the law, which is supposedly based upon reason.

The State contends that the mix of do's and don'ts confronting Officer Taylor places him and other officers, whose primary justification for existence is to protect the rest of us from physical harm, in an unfairly complex position. Officer Taylor found himself confronted by two suspected and unknown drug distributors at a moment when both had been caught in possession of a quantity of drugs which

would send them to prison for many years. One of the suspects refused to remove his hands from behind his back after repeated commands. The suspect made a sudden movement to throw an object into the car. Officer Taylor had to forceably wrestled him to the ground while worrying about the other suspect, who had his hands on the car. During the struggle, Officer Taylor, who was still waiting for his backup to arrive, was bitten by the Defendant's dog (Tr. I, 8).

When Officer Citty arrived they then had to make an instant decision concerning principles which judges, scholars and lawyers have debated for decades. The officers had to decide whether to make a search, and what name to assign to that search. Are they to make an "inventory search," a "search incident to arrest," an "automobile exception search," a "plain

view search" or an "exigent circumstances search"? These decisions had to be made immediately after Officer Taylor had been confronted with a situation in which great danger could have been involved.

This case, therefore, presents facts which support the statements of this Court mentioned previously which reject the step-by-step analysis concerning search and seizure rules, and which are understandable by the police and the public.

In Illinois v. Lafayette, 103 S.Ct. 2605 (1983) the Court drew from its opinion in United States v. Robinson, 414 U.S. 218, 235 (1974) and reiterated:

> "'A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.'" 103 S. Ct. at 2609.

In Oliver v. United States, 104 S. Ct. 1735 (1984) the Court refused to apply the open fields doctrine on a case-by-case basis, stating:

> "Nor would a case-by-case approach provide a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment. Under this approach police officers would have to guess before every search whether landowners had erected fences sufficiently high, posted a sufficient number of warning signs, or located contraband in an area sufficiently secluded to establish a right of privacy. The lawfulness of a search would turn on '[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions . . . .' New York v. Belton, 453 U.S. 454, 458, 101 S.Ct. 2860, 2863, 69 L.Ed.2d 768 (1981) (quoting LaFave, "Case-By-Case Adjudication" versus "Standardized Procedure": The Robinson Dilemma, 1974 S.Ct.Rev. 127, 142. This Court repeatedly has acknowledged the difficulties created for courts, police and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances. See Belton, supra, at 458-460, 101 S.Ct., at 2863-2864; Robbins v. California, 453 U.S. 420,

430, 101 S.Ct. 2841, 2847, 69 L.Ed. 2d 744 (1981) (POWELL, J., concurring); Dunaway v. New York, 442 U.S. 200, 213-214, 99 S.Ct. 2248, 2257-2258, 60 L.Ed.2d 824 (1979); United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 476, 38 L.Ed.2d 427 (1973). The ad hoc approach not only makes it difficult for the policeman to discern the scope of his authority, Belton, supra, 453 U.S., at 460, 101 S.Ct., at 2864; it also creates a danger that constitutional rights will be arbitrarily and inequitably enforced." 104 S. Ct. 1742-1743.

The State also contends that, as stated previously, the search of the luggage was justified since probable cause existed to search the Defendants' entire automobile.

In United States v. Ross, supra, 456 U.S. at 814, this Court observed that "in neither Chadwick or Sanders did the police have probable cause to search the vehicle or anything within it except the footlocker in the former case and the green suitcase in the later." It is settled that

while law enforcement officers may sometimes seize containers and packages, even with less than probable cause, United States v. Place, supra, 103 S.Ct. at 2641, "the mere existence of probable cause to believe that a container or package contains contraband plainly cannot justify a warrantless examination of its contents." United States v. Jacobsen, supra, 104 S.Ct. at 1665 (White, J., concurring).

However, this case and other similar cases differ from Arkansas v. Sanders, supra, and United States v. Chadwick, supra, in that in the latter cases probable cause did not exist to support the belief that evidence relevant to the criminal offense in question could have been in any location other than inside of the footlocker in Chadwick and the suitcase in Sanders. In Sanders there was no reason to believe that the taxicab in

which the defendant was riding contained any contraband. The suitcase was the only possible location of any contraband.

In United States v. Johns, 707 F.2d 1093, 1097-1098 (9th Cir. 1983) the Ninth Circuit rejected the defendants' contention that a search warrant should have been obtained for the search of containers in two trunks which were seized, although the search was held to be invalid due to a three day delay in opening the containers. The Court stated:

> "The officers had probable cause to search both vehicles, not just the new-discovered bales. Their suspicions did not focus solely on the packages; it was not obvious that all the contraband would be in the bales. The appellees could have easily secrete other drugs elsewhere in the vehicles.
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> In United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), the police officers had all the facts giving them probable cause to believe that contraband was in the footlocker and the suitcases before those containers were placed

> in the trunks of the cars. Placing the containers in the car did not give the officers probable cause to search the entire vehicle. In Ross and in this case, the officers' suspicions were not so specific. They did not know the exact nature and packaging of the contraband transferred from the airplanes to the trucks before arriving on the scene. The officers had probable cause to search both trucks. Under Ross, they also could have opened the packages as part of that search.

In United States v. Shepherd, 714 F.2d 316 (4th Cir. 1983) a case with facts similar to those in the present one, the Fourth Circuit upheld the warrantless opening of jugs of moonshine removed from the trunk of a parked automobile. The Court noted:

> "We believe that the case before us is more akin to Ross than to Chadwick and Sanders. Here the object of the agents' search was not directed solely to the interior of a few jugs which were seen loaded into the trunk of Shepherd's car. The agents had good reason to suspect, based on the information they had gathered as well as what they had seen with their own eyes, that the car was an instrumentality of Shep-

> herd's illegal whiskey enterprise, and that a search of the vehicle would disclose additional evidence. As it turned out, this hypothesis proved correct: upon opening the trunk the agents found thirty-eight gallons of illegal liquor, far more than they had observed from their hiding place. Under Ross, once the officers had probable cause to search the vehicle, they also acquired the authority to open any of the closed containers found therein." 714 F.2d at 323.

In the present case, the entire automobile could have been a hideaway for drugs. Drugs could have been placed in the glove compartment under the seat, in the dashboard, over the sunvisor, in the upholstery, in the trunk, under the hubcaps or in the ashtrays. As stated previously, the mere fact that the police knew of the location of "some" of the durgs should not have prevented an intense police search of the entire automobile without a warrant. In Carroll v. United States, supra, the police were allowed to

tear open the seat cushion in the search for contraband.

Here the entire car was the "suspected locus" of possible contraband and the relationship between the automobile and the contraband was obviously more than "purely coincidental." Arkansas v. Sanders, supra, 442 U.S. at 767 (Burger, C. J., concurring in the judgment). Since a magistrate would have issued a search warrant for the entire vehicle, "every part of the vehicle and its contents that may conceal the subject of the search" could be searched. United States v. Ross, supra, 456 U.S. at 825.

A hypothetical may illustrate a situation in which police should be allowed to search an entire vehicle even though they know of the location of some of the objects of the search. Assume a robber wearing a mask forced a bank teller at

gunpoint to place money in a suitcase. The bank's employees observe the robber run outside and place the suitcase in the trunk. After driving a few blocks the robber is stopped by the police and they remove the suitcase from the trunk. The robber does not have either the gun or the mask. Should not the police be allowed to search the suitcase and all containers and compartments in the car without a warrant? Even though the "suspected locus" of the ob ct of part of the search is the suitcase, other parts of the vehicle may contain other of evidentiary items, such as the gun or the ski mask. Warden v. Hayden, 387 U.S. 294 (1967). Also, it is possible the robber could have stopped between the time he robbed the bank and the time he was stopped and removed some of the money from the suitcase. The critical point is that since the entire vehicle may

be a repository for fruits or instrumentalities, pursuant to the dictates of Ross, the police should be allowed to search the entire vehicle, and its compartments and containers, including the luggage. The facts of Chambers v. Maroney, supra, provide a similar scenario and demand a similar holding.

The fact that the automobile was not moving in the present case is irrelevant. In Michigan v. Thomas, 458 U.S. 259 (1982), this Court again rejected the argument that because a vehicle has been immobilized and the occupants are in custody the police are required to obtain a search warrant for the contents. The holding of the Court should apply to the present case:

> "In Chambers v. Maroney, 339 US 42 (1970), we held that when police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a

warrantless search of the vehicle, even after it has been impounded and is in police custody. We firmly reiterated this holding in Texas v. White, 423 US 67 (1975). See also United States v. Ross, 456 US 798, 807, n. 9 (1982). It is thus clear that the justification to conduct such a warrantless search does not valish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the liklihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." 458 U.S. at 261. See also Florida v. Meyers, 104 S.Ct. 1852 (1984); Texas v. White, supra, 423 U.S. 67 (1975); and United States v. Nigro, 727 F.2d 100, 104-107 (6th Cir. 1984).

For the reasons stated, the State submits that all evidence found in the Defendants' automobile was obtained as a result of a constitutionally permissible search since there was probable cause to believe that contraband drugs could have been concealed in various parts of the

automobile and a magistrate would have issued a search warrant for the entire vehicle.

PROPOSITION II

THE SEARCH OF THE BAND-AID BOX FOUND IN THE FRONT SEAT OF THE VEHICLE WAS JUSTIFIED UNDER THE AUTOMOBILE EXCEPTION PRINCIPLE AND AS A SEARCH INCIDENT TO A LAWFUL ARREST.

The Oklahoma Court of Criminal Appeals found that the search of the Band-Aid box, which had been thrown into the vehicle by the Defendant Castleberry as the officer approached with his badge, was illegal and the evidence found in that container should also have been suppressed. The Court stated that since the "suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw in the car" the officers "should have detained these containers until a search warrant had been

obtained." 678 P.2d at 724; A.35-37. As noted previously, the Court stated that, under their interpretation of Ross, Arkansas v. Sanders, and United States v. Chadwick, supra, if an officer has probable cause to believe there is contraband in a specific container in a car, he must detain the container and delay his search until a warrant is obtained. 678 P.2d at 724.

For the reasons stated in Proposition I, the State contends that the holding of this Court in United States v. Ross, supra, is in conflict with this reasoning under the automobile exception principle. If the luggage in the trunk was validly searched under this rule, then certainly there was probable cause to search other containers in the automobile, particularly after drugs were discovered in the suitcases. The Court in Ross specifically

held that the rule allowing the search of the automobile applied "equally to all containers." 456 U.S. at 822. The facts of the present case support the search of the Band-Aid box, which was thrown into the vehicle as the police approached.

The fact that Castleberry was able to lock the car after he had thrown the box inside should make no difference with regard to the legality of the search. In Ross, the detective, after arresting and handcuffing the defendant, took the defendant's keys and opened the trunk where the sack containing the contraband was found. 456 U.S. at 801.

Furthermore, under the principles of United States v. Robinson, supra, 414 U.S. 218, since Officer Taylor had probable cause to arrest Castleberry, he could have searched the box as incident to the custodial arrest. The fact that Castleberry

was able to throw the box into the car after the officer approached him should not prevent the seizure and search of the box. In Oliver v. United States, supra, 104 S. Ct. 1735, 1743, this Court rejected the contention that the defendants' actions in erecting fences and signs "in order to conceal their criminal activity," should provide a right to an expectation of privacy in the premises, stating that:

> "The test is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment."

Therefore, the State contends that the action of the Defendant Castleberry in throwing the Band-Aid box into he car when the police approached should not serve to immunize it from a justified search.

This search of the interior of the automobile, including the Band-Aid box,

should also be upheld based on the search incident to lawful arrest principle of the Fourth Amendment. In New York v. Belton, supra, this Court upheld the search of a jacket found in the backseat of a vehicle belonging to a defendant, who along with his three companions, were in custody and outside the vehicle at the time of the search. This Court specifically held:

> "[w]hen a policeman has made a lawful custodial arrest of the occupants of an automobile, he may, as a contemporaneous incident of that arrest, search the possenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U.S. at 460.

The facts of this case parallel those in Belton, supra. The evidence reveals that Defendant Castleberry was standing next to the vehicle door when he threw the

box inside. Therefore, the area was obviously within his control at the time of his arrest. Cf., New York v. Belton, supra, (coat found in backseat of vehicle).

CONCLUSION

For the reasons stated, it is respectfully requested that this Court reverse the judgment of the Oklahoma Court of Criminal Appeals in this case.

Respectfully submitted,

MICHAEL C. TURPEN
ATTORNEY GENERAL OF OKLAHOMA

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL
DIVISIONS

HUGH A. MANNING
ASSISTANT ATTORNEY GENERAL
112 State Capitol Building
Oklahoma City, OK 73105
(405) 521-3921

COUNSEL FOR PETITIONER

(3)

No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF OKLAHOMA
Petitioner,
v.
TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI
Respondents.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

JOINT APPENDIX

DAVID W. LEE
ASSISTANT ATTORNEY GENERAL
CHIEF, CRIMINAL AND FEDERAL DIVISIONS
112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921
COUNSEL FOR PETITIONER

CHARLES FOSTER COX
Attorney at Law
500 N.W. 13th Street
Oklahoma City, OK 73103
(405) 235-7507
COUNSEL FOR RESPONDENTS

PETITION FOR CERTIORARI
FILED JUNE 11, 1984
CERTIORARI GRANTED NOVEMBER 5, 1984

4388

INDEX

DISTRICT COURT FOR
OKLAHOMA COUNTY, OKLAHOMA

RELEVANT DOCKET ENTRIES
CRF-81-2676
State of Oklahoma v.
Timothy R. Castleberry

Date	Description
6-10-81	Information Filed
6-11-81	Arraignment. The Defendant appears in person and with his attorney, Charles Cox. Bond is set at $2,000.00.
7-1-81	Preliminary hearing. Defendant Castleberry represented by Charles Cox is bound over for trial.
7-2-81	Defendant Castleberry formally arraigned. Defendant appears represented by Charles Cox.
8-18-81	Motion to Suppress filed on behalf of Defendant.
9-23 & 24-81	Jury trial for Defendant Castleberry. Defendant is represented at trial by Charles Cox. Defendant Castleberry is found guilty of the lesser included offense of Possession of Cocaine and the jury set his punishment at imprisonment for a term of eight (8) years.
10-16-81	Defendant Castleberry is formally sentenced as set forth above.
11-3-81	Notice of Appeal filed on behalf on Defendant Castleberry.

DISTRICT COURT FOR
OKLAHOMA COUNTY, OKLAHOMA

RELEVANT DOCKET ENTRIES
CRF-81-2678
State of Oklahoma v. Nicholas Raineri
and Timothy R. Castleberry

Date	Description
6-10-81	Information Filed
6-11-81	Arraignment. The Defendants Castleberry and Raineri appear in person and with their attorney, Charles Cox. Bond is set at $4,000 for both.
7-1-81	Preliminary hearing. Defendants Castleberry and Raineri represented by Charles Cox and both bound over for trial.
7-2-81	Defendants Castleberry and Raineri formally arraigned. Defendants appear represented by Charles Cox.
8-18-81	Motion to Suppress filed on behalf of Defendants Castleberry and Raineri.
9-1 & 2-81	Jury trial for Defendants Castleberry and Raineri. Defendants are represented at trial by Charles Cox. Defendant Castleberry is found guilty of the offense of Possession of Methaquaalone With Intent to Distribute in Count I and the jury set his punishment at imprisonment for a term of ten (10) years with a fine of $5,000.00; in Count II the Defendant Castleberry is found guilty

of Possession of Marijuana With Intent to Distribute and the jury set his punishment at imprisonment for a term of seven (7) years and a fine of $5000.00. Defendant Raineri is found guilty of the crime of Possession of Metaquaalone With Intent to Distribute in Count I and the jury set his punishment at imprisonment for a term of seven (7) years with a fine of $5,000.00. In Count II the Defendant Raineri is found guilty of Possession of Marijuana With Intent to Distribute and the jury set punishment at imprisonment for a term of seven (7) years and a fine of $5000.00.

10-16-81 Defendants Castleberry and Raineri are formally sentenced as set forth above, with each sentence on Count II to run concurrently with Count I and the fines as to Count II are suspended.

11-3-81 Notice of Appeal filed on behalf on Defendants Castleberry and Raineri.

RELEVANT DOCKET ENTRIES IN
THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA
IN F-82-227 AND F-82-228

5-13-82 Defendant Castleberry's and Raineri's Motion to Consolidate Appeals in Case Nos. F-82-227 and F-82-228 filed.

7-23-83 Order of Court of Criminal Appeals granting Defendants' Motion to Consolidate Appeals.

1-23-83 Opinion of the Oklahoma Court of Criminal Appeals in consolidated Case Nos. F-82-227 and F-82-228.

2-13-84 State files Petition for Rehearing.

4-5-84 Order Denying Rehearing.

5-9-84 Order Staying Execution of Mandate.

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CRF-81-2676
	)	
TIMOTHY R. CASTLEBERRY	)	
	)	
Defendant.	)	

MOTION TO SUPPRESS

COMES NOW the defendant above named and moves this Court to suppress as evidence against him in this case, all evidence, whether tangible or intangible, obtained as a result of the Defendant's search or arrest for the reason that the search of the Defendant and the arrest of the Defendant was illegal and in violation of the Defendant's rights under the United States Constitution and Statutes and Constitution of the State of Oklahoma.

/s/ Charles F. Cox
CHARLES F. COX
500 Northwest 13th Street
Oklahoma City, Oklahoma
73103
Telephone: (405) 235-7507

ATTORNEY FOR DEFENDANT

VERIFICATION

STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

I, Charles F. Cox, of lawful age and having been duly sworn, depose and state as follows: That I am the attorney for defendant in the above and foregoing Motion to Suppress; that I have read said Motion and am familiar with the contents thereof; that the statements and facts contained in said Motion are true and correct to the best of my information, knowledge and belief.

/s/Charles F. Cox
Charles F. Cox

Subscribed and sworn to before me this /s/ 22 day of /s/ July, 1981.

/s/ Linda Campbell
NOTARY PUBLIC

My Commission Expires:

/s/ Aug. 2, 1981

IN THE DISTRICT COURT WITHIN AND FOR
OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE STATE OF OKLAHOMA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CRF-81-2678
	)	
TIMOTHY R. CASTLEBERRY	)	
and NICHOLAS RAINERI	)	
	)	
Defendants.	)	

MOTION TO SUPPRESS

COMES NOW the defendants above named and move this Court to suppress as evidence against them in this case, all evidence, whether tangible or intangible, obtained as a result of the Defendants' search or arrest for the reason that the search of the Defendants and the arrest of the Defendants was illegal and in violation of the Defendants' rights under the United States Constitution and Statutes and Constitution of the State of Oklahoma.

/s/ Charles F. Cox
CHARLES F. COX
500 Northwest 13th Street
Oklahoma City, Oklahoma
73103
Telephone: (405) 235-7507

ATTORNEY FOR DEFENDANT

VERIFICATION

STATE OF OKLAHOMA)
) ss
COUNTY OF OKLAHOMA)

I, Charles F. Cox, of lawful age and having been duly sworn, depose and state as follows: That I am the attorney for defendant in the above and foregoing Motion to Suppress; that I have read said Motion and am familiar with the contents thereof; that the statements and facts contained in said Motion are true and correct to the best of my information, knowledge and belief.

/s/Charles F. Cox
Charles F. Cox

Subscribed and sworn to before me this /s/ 22 day of /s/ July, 1981.

/s/ Linda Campbell
NOTARY PUBLIC

My Commission Expires:

/s/ Aug. 2, 1981

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA, SITTING IN AND FOR
OKLAHOMA COUNTY, OKLAHOMA

THE STATE OF OKLAHOMA,)
)
Plaintiff,)
)
-vs-) No. CRF-81-2676
)
TIMOTHY R. CASTLEBERRY,)
)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 16th day of October, 1981, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant TIMOTHY R. CASTLEBERRY being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, CHARLES FOSTER COX, and having been legally charged with the offense of POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE WITH INTENT TO DISTRIBUTE, TO-WIT: COCAINE, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of

his rights; and having been duly and legally tried and convicted of the crime of TO THE INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE, TO-WIT: COCAINE, and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of TO THE INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE, TO-WIT: COCAINE

It is Therefore, Ordered, Adjudged and Decreed by the Court that TIMOTHY R. CASTLEBERRY is sentenced to a term of EIGHT (8) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of TO THE INCLUDED OFFENSE OF POSSESSION OF A CONTROLLED DANGEROUS SUBSTANCE, TO-WIT: COCAINE; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $77.00, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.
(Seal)

/s/ Homer Smith
HOMER SMITH,
District Judge

Attest:

DAN GRAY,
Court Clerk

By /s/ Kim Williams, Deputy Court Clerk

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA, SITTING IN AND FOR
OKLAHOMA COUNTY, OKLAHOMA.

THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	No. CRF-81-2678
	)	
TIMOTHY R. CASTLEBERRY,	)	
	)	
Defendant.	)	

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 16th day of October, 1981, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant TIMOTHY R. CASTLEBERRY being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, CHARLES F. COX, and having been legally charged with the offense of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted

of the crime of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE

It is Therefore, Ordered, Adjudged and Decreed by the Court that TIMOTHY R. CASTLEBERRY is sentenced to a term of TEN (10) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $45.76, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.
(Seal)
(DEFENDANT TO PAY A FINE OF $5,000.00)

/s/ CHARLES L. OWENS
CHARLES L. OWENS, District Judge

Attest:

DAN GRAY,
Court Clerk

By /s/ Mary Evelyn Moncrief, Deputy Court Clerk

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA, SITTING IN AND FOR
OKLAHOMA COUNTY, OKLAHOMA.

THE STATE OF OKLAHOMA,)
)
Plaintiff,)
)
-vs-) No. CRF-81-2678
)
TIMOTHY R. CASTLEBERRY,)
)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 16th day of October, 1981, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant TIMOTHY R. CASTLEBERRY being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, CHARLES F. COX, and having been legally charged with the offense of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly

and legally tried and convicted of the crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE

It is Therefore, Ordered, Adjudged and Decreed by the Court that TIMOTHY R. CASTLEBERRY is sentenced to a term of SEVEN (7) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $45.75, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.
(Seal) (THIS COUNT 2 TO RUN CONCURRENTLY WITH COUNT 1)

/s/ CHARLES L. OWENS
CHARLES L. OWENS, District Judge

Attest:

DAN GRAY,
Court Clerk

By /s/ Mary Evelyn Moncrief, Deputy Court Clerk

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA, SITTING IN AND FOR
OKLAHOMA COUNTY, OKLAHOMA.

THE STATE OF OKLAHOMA,)
)
Plaintiff,)
)
-vs-) No. CRF-81-2678
)
NICHOLAS RAINERI,)
)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 16th day of October, 1981, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant NICHOLAS RAINERI being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, CHARLES F. COX, and having been legally charged with the offense of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the

crime of COUNT 1: POSSESSION OF METH-AQUAALONE WITH INTENT TO DISTRIBUTE and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of COUNT 1: POS-SESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE

It is Therefore, Ordered, Adjudged and Decreed by the Court that NICHOLAS RAINERI is sentenced to a term of nine (9) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is commit-ted to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of COUNT 1: POSSESSION OF METHAQUAALONE WITH INTENT TO DISTRIBUTE; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAl-ester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $45.76, for which judgment is hereby rendered against the defendant; and there-upon the defendant is by the court noti-fied of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.
(Seal)
(DEFENDANT TO PAY A FINE OF $5,000.00)

/s/ CHARLES L. OWENS
CHARLES L. OWENS, District Judge

Attest:

DAN GRAY,
Court Clerk

By /s/ Mary Evelyn Moncrief, Deputy Court Clerk

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

IN THE DISTRICT COURT OF THE
SEVENTH JUDICIAL DISTRICT OF THE
STATE OF OKLAHOMA, SITTING IN AND FOR
OKLAHOMA COUNTY, OKLAHOMA.

THE STATE OF OKLAHOMA,)
)
Plaintiff,)
)
-vs-) No. CRF-81-2678
)
NICHOLAS RAINERI,)
)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

Now, on this 16th day of October, 1981, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant NICHOLAS RAINERI being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, CHARLES F. COX, and having been legally charged with the offense of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE, and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the

crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE and the defendant having been asked by the court whether he has any legal cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause to show why judgment and sentence should not be pronounced against him, and he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE

It is Therefore, Ordered, Adjudged and Decreed by the Court that NICHOLAS RAINERI is sentenced to a term of SEVEN (7) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of COUNT 2: POSSESSION OF MARIHUANA WITH INTENT TO DISTRIBUTE; said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $45.75, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.
(Seal) (THIS COUNT 2 TO RUN CONCURRENTLY WITH COUNT 1)

/s/ CHARLES L. OWENS
CHARLES L. OWENS, District Judge

Attest:

DAN GRAY,
Court Clerk

By /s/ Mary Evelyn Moncrief , Deputy Court Clerk

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-82-227
No. F-82-228

TOMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI
Appellants,

v.

THE STATE OF OKLAHOMA,
Appellee.

[Filed January 23, 1984]

OPINION

BRETT, Judge:

Timothy R. Castleberry and Nicholas Raineri, appellants, were charged with two (2) counts each of Possession of a Controlled Dangerous Substance with Intent to Distribute in the District Court of Oklahoma County, Case No. CRF-81-2678. The jury found the appellants guilty on both counts, and assessed punishment for

Raineri at nine (9) years' imprisonment and a fine of five thousand dollars ($5,000) for Count 1 and seven (7) years' imprisonment plus a five thousand dollar ($5,000) fine for Count 2; and, for Castleberry, ten (10) years' imprisonment plus a fine of five thousand dollars ($5,000) for Count 1 and seven (7) years' imprisonment plus a five thousand dollar ($5,000) fine for Count 2. The trial court sentenced the appellants accordingly, additionally ordering the sentences to run concurrently and suspending the fine for Count 2 as to both appellants.

Appellant Castleberry was separately convicted of Possession of a Controlled Dangerous Substance, Cocaine, in Case No. CRF-82-2676 in the Oklahoma County District Court. The trial court sentenced him to eight (8) years' imprisonment. The appeals from the judgments

and sentences are consolidated since the same factual circumstances are involved in each case.

At approximately noontime on June 9, 1981, Oklahoma City Police Officer R.D. Taylor received a telephone call from a previously unknown confidential informant who told him that two men, one named Castleberry, were staying in Room 113 of a motel in Oklahoma City, driving a blue Thunderbird with Florida license plates and carrying various narcotics in blue suitcases. The informant also gave physical descriptions of the men to the officer.

Officer Taylor proceeded immediately to the location, observed a vehicle matching the informant's description in front of the specified room, and discovered, from the motel clerk, that a man named Castleberry was registered in

that room. He then returned to his car, positioned some five parking spaces from the other vehicle, and waited for back-up assistance to arrive. After several minutes, Officer Taylor observed the appellants emerge from the room and put several suitcases that matched the informant's description into the trunk of the car. At this point, Officer Taylor announced himself as a police officer, approached the car with his badge in one hand and his weapon in the other, and told the appellants to place their hands on the car. Raineri did as ordered, but Castleberry hastily closed the trunk lid and threw a small white object into the car. During a struggle which ensued between Officer Taylor and Castleberry, Castleberry reached up, locked the car door and shut it.

At this point, Officer Citty arrived and opened the trunk of the car with keys Officer Taylor had removed from the door of the car. The officers opened the suitcases, found narcotics and placed the appellants under arrest. Officer Citty then searched the interior of the car and discovered a white Band-Aid box which contained a substance later determined to be cocaine.

Appellants' sole assignment of error is that the trial court erred in overruling their motion to suppress, thereby admitting evidence obtained as a result of an unlawful arrest, search and seizure. The Fourth Amendment of our federal constitution prohibits unreasonable searches and seizures. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment,

subject only to a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exingencies [sic] of the situation made that course imperative. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Thus, it is incumbent on the State to show why the warrantless search of the car and its contents was permissible in the case at bar.

The State first contends that the search was lawful as incident to a lawful arrest. Appellants challenge both the legality of the arrest and the scope of the search.

Although Officer Taylor testified that he did not arrest the appellants un-

til after the suitcases were opened, the appellants were not free to move after the officer advanced toward them with revolver drawn and ordered them to place their hands on the car. This Court has held that when an officer restrains the individual's freedom of movement, that person is under arrest. Wallace v. State, 620 P.2d 410 (Okl.Cr. 1980), Castellano v. State, 585 P.2d 361 (Okl.Cr. 1978). Under the circumstances, the appellants in the present case were under arrest from the moment Officer Taylor approached them and announced his identity.

Appellants submit that the arrest was unlawful because Officer Taylor did not at that time have probable cause to make it. The Oklahoma statutes allow a warrantless arrest if the officer has reasonable cause to believe a felony has been committed by the person arrested. 22 O.S.1981, § 196.

If at the time of arrest the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that an offense had been or was being committed, probable cause is established and the arrest is lawful. Beck v. Ohio, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed. 2d 142 (1964), Greene v. State, 508 P.2d 1095 (Okl.Cr. 1973).

In this case, appellants argue that the officer had no basis for judging his informant to be reliable or the information trustworthy. We disagree. In Grimes v. State, 528 P.2d 1397 (Okl.Cr. 1974), this Court stated that an informant's trustworthiness could be established if independent facts within the officer's knowledge corroborated the information. Here, the information was

sufficiently corroborated as the only detail not confirmed before the arrest was the presence of narcotics in the suitcases, an allegation Officer Taylor could not lawfully verify before the arrest under the given circumstances.

The search made subsequent to the arrest, however, cannot be justified as a search incident to a lawful arrest, for it far exceeded the permissible bounds of such a search, that is, the area within the arrestee's immediate control from which he might gain possession of a weapon or destructible evidence. See Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). Both appellants were restrained--one was handcuffed, the other was on the ground with an officer pointing a gun at him--at the time of the search. The car doors and trunk were locked, so once the officer gained posses-

sion of the keys, there was no danger of appellants' procuring a weapon or destroying evidence from the interior of the car. A search incident to the arrest would therefore justify neither a search of the locked car nor a search of the suitcases therein.

The State's only other justification offered is that the warrantless search was lawful because the officers had probable cause to believe that narcotics were in the suitcases and exigent circumstances required prompt action. The so-called automobile exception on which the State relies was first recognized in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Cases subsequent to Carroll caused some confusion about when containers in cars may be searched, but the Supreme Court clarified the law in

United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982).

If the officer has probable cause to believe there is contraband somewhere in the car, but he does not know exactly where, he may search the entire car as well as any containers found therein. See United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). If, on the other hand, the officer only has probable cause to believe there is contraband in a specific container in the car, he must detain the container and delay his search until a search warrant is obtained. See United States v. Ross, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61

L.Ed.2d 235 (1979); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed. 2d 538 (1977).

The Ross court adopted Chief Justice Burger's distinction set out in his concurring opinion to Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), wherein he explained that:

> [I]t was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more. (Citations omitted). Id., at 766-767, 99 S.Ct. at 2594.

United States v. Ross, 456 U.S. at 813, 102 S.Ct. at 2166-67, 72 L.Ed.2d at 586-87.

The case at bar clearly falls within the Chadwick - Sanders line of cases. The

suspected locations of the contraband were the suitcases and the Band-Aid box which Castleberry threw into the car. Accordingly, we hold that the motion to suppress was erroneously overruled. The officers should have detained the containers until a search warrant had been obtained.

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those

> who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.

McDonald v. United States, 335 U.S. 451, 445-456, 69 S.Ct. 191, 193, 93 L.Ed. 153 (1948).

For the reasons herein stated, the judgments and sentences appealed from should be, and the same are hereby, REVERSED.

CORNISH, J., specially concurs.

BUSSEY, P.J., dissents.

CORNISH, Judge, specially concurring.

I fully concur in Judge Brett's analysis and application of the Supreme Court's precedents in this case. I would simply note that it has been settled in this State for several years that probable cause will not support a warrantless search in the absence of an emergency, i.e., "exigent circumstances":

> [I]t is without question that the existence of probable cause alone will not satisfy a warrantless search. Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); Whitehead v. State, 546 P.2d 273 (Okl.Cr.1975). Ordinarily, if an officer has probable cause to make a search, then he should go to a magistrate for a warrant authorizing such a search. Only when there are 'exigent circumstances' in addition to the existence of probable cause may an officer legitimately make a search without a warrant.

Blackburn v. State, 575 P.2d 638, 642 (Okl.Cr. 1978).

Absent probable cause to search the entire car, the officers were only authorized to seize the suspect containers and hold them pending issuance of a search warrant. Although probable cause existed with regard to the containers, no exigent circumstances were shown such as to justify a warrantless search.

IN THE COURT OF CRIMINAL APPEALS OF THE

STATE OF OKLAHOMA

TIMOTHY R. CASTLEBERRY and NICHOLAS RAINERI,	)	
Appellants,	)	
-vs-	)	Case No.
	)	F-82-227
THE STATE OF OKLAHOMA,	)	F-82-228
Appellee.	)	

ORDER DENYING REHEARING

In an opinion dated January 23, 1984, this Court reversed the convictions for drug offenses in Oklahoma County Case Nos. CRF-82-2676 and CRF-82-2678. On February 13, 1984, the State filed a petition requesting this Court to grant a rehearing.

NOW THEREFORE, after considering the petition and reviewing the record, this Court finds that the petition for rehearing should be, and the same is, DENIED. The mandate shall issue forthwith.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this /s/ 5th day of /s/April, 1984.

/s/Hez. J. Bussey
HEZ. J. BUSSEY, Presiding Judge

/s/Tom Brett
TOM BRETT, Judge

ATTEST:

/s/Susan Hampton, Deputy
Clerk

No. 83-2126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF OKLAHOMA,

Petitioner,

v.

TIMOTHY R. CASTLEBERRY,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF OKLAHOMA

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE LEGAL FOUNDATION OF AMERICA, IN SUPPORT OF THE PETITIONER

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IN THE

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**BRIEF AMICI CURIAE OF
AMERICANS FOR EFFECTIVE
LAW ENFORCEMENT, INC.
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
AND THE
LEGAL FOUNDATION OF AMERICA,
IN SUPPORT OF THE PETITIONER**

This is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Michael C. Turpen, Attorney General, State of Oklahoma, Counsel for Petitioner, and Charles Foster Cox, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-eight times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA) is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

Amici well know the problems faced by police officers in their good faith attempts to conduct searches and seizures that

comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth Amendment. The state of this intricate complex of rules as applicable to the search of automobiles compels these organizations to speak on behalf of law enforcement officers in this case, so that this Court will complete the task of adopting a workable bright line rule for the search of vehicles left unfinished by *United States* v. *Ross*, 456 U.S. 798 (1982).

ARGUMENT

I.

THIS COURT SHOULD CLEAR AWAY THE INCOMPREHENSIBLE DISTINCTIONS EXISTING IN THE RULES FOR WARRANTLESS SEARCHES OF AUTOMOBILES AND ADOPT A BRIGHT LINE RULE FOUNDED UPON THE ORIGINAL PURPOSE AND INTENT OF *CARROLL* V. *UNITED STATES* THAT DOES NOT REQUIRE A CONTAINER EXCEPTION AND THAT CAN BE READILY UNDERSTOOD AND APPLIED BY POLICE OFFICERS

Americans for Effective Law Enforcement has been privileged to file many *amicus curiae* briefs with this Court. In several of them, as in the present one, it has been joined by the *International Association of Chiefs of Police* and the *Legal Foundation of America*. Those briefs have presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, and without impinging upon basic constitutional protections. In the present brief, as in the brief *AELE* and *IACP* filed in *United States* v. *Ross*, we are dispensing with an extended analysis of the case law. We confine our brief essentially to a suggested resolution of the perennial police dilemma caused by the intolerable confusion that continues to confront them as they must determine what containers within an automobile they can or cannot search—*after having already made an accurate judgment as to probable cause to search the vehicle itself.*

As we did in *Ross*, we urge the Court to adopt a uniform rule which would permit the search of all containers found in a vehicle when the prerequisites for a search of the vehicle itself have been satisfied, as prescribed in *Carroll* v. *United States*, 267 U.S. 132 (1925). Although this Court in *Ross* took a substantial step in clarifying the rules with respect to the search

of vehicles, the condition it imposed, to the effect that where the police have probable cause to believe that a specific container in a car has contraband they must first obtain a warrant, has perpetuated some of the confusion concerning vehicle searches that existed prior to *Ross*. We repeat much of our argument in our *amici* brief in *Ross* and point out additional problems raised by that case.

The decisions of *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), left intact in *Ross*, which protect some containers from searches while allowing others to be searched, are based upon the test of "reasonable expectation of privacy." That test evolved in *Katz* v. *United States*, 389 U.S. 34 (1967), in which the Court concerned itself only with the question of whether a search had actually occurred within the meaning of the Fourth Amendment. It seems highly irrational, however, to hold that a search occurs in violation of the Fourth Amendment when the police make a nonconsensual inspection of a suitcase found in an automobile where they had presearch knowledge that it contained contraband or evidence, while no violation occurs if they did not have such presearch knowledge but only a general knowledge that contraband would be found somewhere in the vehicle. *The issue should only be whether the search was reasonable.* It is impractical, and of no guidance to the police, to make the reasonableness of a search of a container depend upon the precise degree of privacy expectation with respect to each such container. To the extent that *Ross* perpetuates this rule we urge the Court to repudiate it.

There are myriad grades of expectation of privacy, just as there are myriad grades of police intrusion. This Court has indicated in *Dunaway* v. *New York*, 442 U.S. 200 (1979), that the police need fixed standards and that a sliding scale approach with a number of gradations is unsatisfactory. The citizen is better protected if the officer clearly knows what is permissible and what is not, without the appendage of a near-disabling exception to a general rule.

Perpetuation of any part of the "expectation of privacy" test in automobile search and seizure cases offers no satisfactory guidance to the police with respect to containers found within the vehicle. It does not provide an understandable distinction. The Court apparently thought it was doing that in *Ross*, but what the police need is understandable guidance rather than esoteric distinctions which are meaningless to them. *Amici AELE* and *IACP* are involved in police training programs at the national level and can attest to the fact that teaching the *Ross* container distinction to police officers is a near impossibility.

Requiring the police to pursue the only available safe sure investigative practice of seeking a search warrant for the examination of containers found in a vehicle produces several unfavorable consequences. First of all, where there is probable cause to search an automobile—and this is the premise for all we suggest—a magistrate will rarely refuse to issue a warrant. In such instances police compliance with the formality required by *Ross* may be viewed as a satisfaction of the majesty of the law, but the price for this unnecessary reward is an unaffordable one. It is unaffordable not only in terms of police service but also as regards the judicial system as well.

Secondly, police time is desperately needed for the detection and prevention of crime, and for the apprehension of dangerous offenders. The time needed for the procurement of a warrant to search a container found in a car could be better devoted to those purposes. Several hours may be required for a police officer to draft and present in court a search warrant application and a proposed search warrant. Meanwhile, another officer has to spend his time securing and holding the container. Then, too, in rural areas an even longer period of time may be required to obtain a warrant. Thirdly, as this Court knows all too well, the judiciary is greatly overburdened with cases awaiting determinations of guilt or innocence, and they have precious little time to spend on formality compliances.

In addition to wastage of police and court time, consideration is in order for the motorist whose vehicle containers do not in fact contain illegal evidence, irrespective of the existence of probable cause for the search. An on-the-scene search would have conserved his time as well as that of the police and the court. This was one of the considerations underlying the Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42 (1970), which re-affirmed the right of officers to make a warrantless search under the *Carroll* doctrine.

There is an additional and compelling reason why the distinction imposed by *Ross* should be eliminated. Quite frankly, it may encourage some police officers to gather *less* probable cause information than they might otherwise do. *Ross* tells them, in effect, that if their probable cause information for the search of a vehicle is container specific they need a warrant to search the container, whereas if their probable cause information is not container specific, they do not need a warrant for containers they find that could hold the object of their search. In some cases informants may not be encouraged to tell the police exactly *where* in a vehicle contraband may be found. Such a rule does not promote the spirit and intent of the Fourth Amendment to be as thorough as practical and possible in gathering information upon which to base probable cause, as was the rationale of the holdings of this Court in *Draper* v. *United States*, 358 U.S. 307 (1959), *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969). *Amici* support this salutory rationale and urge this Court to eliminate the *Ross* container distinction because it's practical, though unintended, effect may not actually promote the broadest possible goals of Fourth Amendment compliance by the police.

We urge the Court to adopt a rule in automobile search cases comparable to that applicable to the search of an arrested person. Of him a full search is permissible, regardless of whatever expectations of privacy he may have had as to the

contents of his pockets. A clear cut pronouncement should be made by the Court that *once there is probable cause to search a car, the police may search any container within any part of the car.* As to the exclusionary rule in this type of case, and, in fact, all others, exceptions should be made for good faith mistakes by police officers as recognized by this Court in *United States* v. *Leon,* ___ U.S. ___, 104 S.Ct. 3405 (1984) and *Massachusetts* v. *Sheppard,* ___ U.S. ___, 104 S.Ct. 3425 (1984).

As we noted in our *amici* brief in *Ross,* if the police abuse the suggested container-search privilege, there are adequate available legal remedies, criminal and civil, and the force of public opinion is a factor that should not be overlooked, especially in this type of case where the Court has granted a guide-lined privilege urged upon it by the police themselves. We urge the Court to complete the task of revising the rules for the search of vehicles it undertook in *New York* v. *Belton,* 453 U.S. 454 (1981) and *Ross* by eliminating the container distinction once and for all.

CONCLUSION

Amici respectfully submit that the decision of the Court of Criminal Appeals of Oklahoma should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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No. 83-2126

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1981

THE STATE OF OKLAHOMA,

Petitioners,

v.

TIMOTHY R. CASTLEBERRY AND
NICHOLAS RAINERI,

Respondents.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether, when officers arrest a suspect on probable cause, and the suspect, who is standing next to the vehicle, is able to place a container inside the vehicle, the police may search the container as being a search incident to arrest.

No. 83-2126

IN THE SUPREME COURT

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OCTOBER TERM, 1981

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BRIEF FOR THE PEOPLE OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

INTEREST OF THE PEOPLE OF THE STATE OF CALIFORNIA

Since this Court's decision in United States v. Chadwick, 433 U.S. 1 (1977), the law governing the search of

containers has been unsettled and uncertain. California's peace officers, like those of Oklahoma, seek "bright lines" to aid them in determining quickly and accurately whether a container which has been lawfully seized may be searched without a warrant, or whether the primacy of the warrant requirement necessitates the approval of a neutral and detached magistrate. This case presents an opportunity to this Court to resolve unanswered questions concerning the legality of the search of a container in the context of a lawful custodial arrest. Our interest in clarifying this aspect of search and seizure jurisprudence, which is vitally relevant to the day-to-day conduct of police officers, brings the People of the State of California before this Honorable Court as amicus curiae.

SUMMARY OF ARGUMENT

New York v. Belton, 453 U.S. 454 (1981), held that a container found in the immediate control of an arrestee may be searched as an incident to a lawful custodial arrest. The question presented by this case is whether the legality of such a search may be defeated by the arrestee's attempt to place the object to be searched out of his reach (and that of the officer) in response to the officer's lawful approach. Amicus does not believe that an arrestee may increase his reasonable expectation of privacy by a desperate attempt to discard or lock away an object which was in his possession, and the proper subject of a search, before he encountered the arresting officer. Where, as here, the arrestee places the object in a vehicle, which itself is surrounded by a reduced expectation of

privacy, the officer may seize the object and search it as an incident to arrest.

ARGUMENT

THE CONTAINERS WHICH THE DEFENDANTS TRIED TO PLACE BEYOND THE CONTROL OF THE OFFICERS WERE PROPERLY SEIZED AND SEARCHED WITHOUT A WARRANT.

A

Since each search must be decided on its own facts, we set forth the relevant facts which were stated in Castleberry v. State, 678 P.2d 720, 722 (Okla. Ct. Crim. App. 1984):

> "At approximately noontime on June 9, 1981, Oklahoma City Police Officer R. D. Taylor, received a telephone call from a previously unknown confidential informant who told him that two men, one named Castleberry, were staying in Room 113 of a motel in Oklahoma City, driving a blue Thunderbird with Florida license plates and carrying various narcotics in blue suitcases. The informant also gave physical descriptions of the men to the officer.

> "Officer Taylor proceeded immediately to the location, observed a vehicle matching the informant's description in front of the specified room, and discovered, from the motel clerk, that a man named Castleberry was registered in that room. He then returned to his car, positioned some five parking spaces from the other vehicle, and waited for back-up assistance to arrive. After several minutes, Officer Taylor observed the appellants emerge from the room and put several suitcases that matched the informant's description into the trunk of the car. At this point, Officer Taylor announced himself as a police officer, approached the car with his badge in one hand and his weapon in the other, and told the appellants to place their hands on the car. Raineri did as ordered, but Castleberry hastily closed the trunk lid and threw a small white object into the car. During a struggle which ensued between Officer Taylor and Castleberry, Castleberry reached up, locked the car door and shut it.
>
> "At this point, Officer Citty arrived and opened the trunk of the car with keys Officer Taylor had removed from the door of the car. The officers opened the suitcases, found narcotics and placed the

appellants under arrest. Officer Citty then searched the interior of the car and discovered a white Band-Aid box which contained a substance later determined to be cocaine."

B

To be candid, the law governing the search of containers has been less than a seamless web since this Court's decision in United States v. Chadwick, 433 U.S. 1 (1977). Basically, the law is as follows:

(1) Chadwick held that a container which is reasonably believed to be the repository of criminal evidence may be seized without a warrant, but that a warrant must be secured before police search the receptacle. This base-line doctrine is subject to the following major exceptions:

(2) If the container is found in the immediate possession of an

arrestee, it may be searched without a warrant, either on the spot (New York v. Belton, 453 U.S. 454 [1981]), or at the station house (Illinois v. Lafayette, 462 U.S. 640 [1983]; United States v. Edwards, 415 U.S. 800 [1974]). If the arrestee is the occupant of an automobile, "immediate possession" has been defined to include the passenger compartment of the car (New York v. Belton, supra), but not the trunk (id. at 461 n. 4; See Robbins v. California, 453 U.S. 420 [1981]).

(3) Since a car may be searched without a warrant if police have probable cause to believe that it contains evidence of crime (Carroll v. United States, 267 U.S. 132 [1925]; Chambers v. Maroney, 399 U.S. 42 [1970]), this Court held that probable cause also "justifies the search of every part of the vehicle and its

contents that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982).

(4) However, the exception defined in Ross is itself subject to an exception: If probable cause focuses upon a container, its placement in a car does not justify the warrantless search of the receptacle. Arkansas v. Sanders, 442 U.S. 753 (1979). The reasoning of this Court was that the presence of the car was merely fortuitous. Since probable cause attached only to the container, not to the vehicle, the rule of Chadwick was dispositive.

C

Resolution of the issue posed by this case depends in the first instance upon an accurate classification of the search. For the reasons stated by the Chief Justice in his concurrence in Sanders, we do not believe that this case

involves the "automobile" exception to the warrant requirement:

> "Here, as in Chadwick, it was the luggage being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case." 442 U.S. at 767.

However, it does not follow, as the Oklahoma Court of Criminal Appeals held, that this case is governed by Sanders. Rather, we believe that this case may be best understood as involving a search incident to a valid custodial arrest.

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(1)

It is clear that if defendants had been arrested[1/] while carrying the suitcases and Band-Aid box, those receptacles could have been searched on the spot. New York v. Belton, supra; Chimel v. California, 395 U.S. 752 (1969). However, Officer Taylor did not identify himself until defendants had placed the suitcases in the trunk, presumably because he wanted to verify that part of the tip regarding the blue Thunderbird with Florida license plates. If Castleberry had obeyed the officer's commands by placing his hands on the car, the box on his person could have been seized and searched.

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1. The informant's tip, combined with the officer's observations, provided probable cause to arrest the defendants. Cf. Massachusetts v. Upton, 466 U.S. ___, 104 S.Ct. 2085 (1984); Illinois v. Gates, 462 U.S. 213 (1983); Draper v. United States, 358 U.S. 307 (1959).

We believe that the suitcases could also have been searched without a warrant, for both men were within reach of the open trunk. It is true that this Court in Belton declared that its holding "does not encompass the trunk" (453 U.S. at 461 n. 4), but that case presented a significantly different factual situation. Belton, which involved the occupants of a car, drew a "bright line" between the passenger compartment and the trunk. This distinction was cogently explained by Justice Powell:

> "The occupants of an automobile enjoy only a limited expectation of privacy in the interior of the automobile itself. See Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring). This limited interest is diminished further when the occupants are placed under custodial arrest. Cf. United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring). Immediately preceding the arrest, the

> the passengers have complete control over the entire interior of the automobile, and can place weapons or contraband into pockets or other containers as the officer approaches. Thus, practically speaking, it is difficult to justify varying degrees of protection for the general interior of the car and for the various containers found within. These considerations do not apply to the trunk of the car, which is not within the control of the passengers either immediately before or during the process of arrest." Robbins v. California, supra, 453 U.S. at 431-432.

By contrast, defendants were in close physical proximity to the trunk; indeed, they had opened it to place the suitcases within it. Unlike the arrestees in a Belton-type situation, the defendants had direct access to, and control of, the open trunk. The suitcases were in their immediate reach within the meaning of Chimel.

But Castleberry did not do as he was instructed, choosing instead to

lock the trunk and place the Band-Aid box in the passenger compartment, which he also locked. According to the Oklahoma Court of Criminal Appeals, the act of locking the car and trunk activated the warrant requirement of the Fourth Amendment.

In the context of this case, we can think of no viable social or legal policy which is advanced by conferring the highest possible protection of the Fourth Amendment upon an arrestee for refusing to obey a lawful order of a police officer. If Castleberry had followed the officer's instructions, the warrantless seizure and search would have occurred as a matter of course. But we do not believe that Castleberry's decision to make things difficult invalidated the officer's conduct. Our reading of this Court's cases, as applied to this situation, yields this

rule. The legality of warrantless search may not be defeated by the arrestee's purposeful placement of the object to be searched out of the reach of the officer in response to his lawful approach. Just as the defendant in United States v. Santana, 427 U.S. 38 (1976), could not avoid a lawful warrantless arrest by retreating inside her home when the police caught to arrest her, so the defendants in this case could not avoid a lawful incident search by the expediency of locking the car.

We do not mean to suggest, however, that if defendants had placed the suitcases in their motel room and locked the door as the officers closed in to make the arrest, the officers could have entered and searched without a warrant. It well may be that the sanctity of the dwelling place must, in the absence of exigent circumstances

(Warden v. Hayden, 387 U.S. 294, 298-300 [1967]), be given the traditional protection of the search warrant requirement. "Belief, however well founded, that an article sought is concealed in a dwelling place furnishes no justification for a search of the place without a warrant." Agnello v. v. United States, 269 U.S. 20, 33 (1925); cf. Vale v. Louisiana, 399 U.S. 30 (1970).

But the containers were placed in a vehicle, which is surrounded by a reduced expectation of privacy. United States v. Chadwick, supra, 433 U.S. at 12. The officers had the right to enter the car to remove the receptacles. See Arkansas v. Sanders, supra, 442 U.S. at 761; United States v. Chadwick, supra, 433 U.S. at 13; cf. United States v. Place, 462 U.S. 696 (1983). Given the right of the officers to seize the

containers before and after the arrest, and the right to search the receptacles before the trunk and car door were closed, there is no reason in law or common sense why the suitcase and Band-Aid box could not be searched as an incident to the arrest after their removal from the car. Cf. United States v. Bradley, 455 F.2d 1181, 1187 (1st. Cir. 1972), aff'd on other issues, 410 U.S. 605 (1973).

The foregoing position is not inconsistent with this Court's prior cases. United States v. Chadwick, supra, did not involve an arguably valid search incident to a lawful custodial arrest: "Here the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as

justified by any other exigency." 433 U.S. at 15; see New York v. Belton, supra, 453 U.S. at 462.

Candidly, we are troubled by Chadwick's rationale. It would appear to be inconsistent with this Court's declaration that "searches and seizures that could be made on the spot at the time of arrest may legally be conducted later when the accused arrives at the place of detention." United States v. Edwards, 415 U.S. 800, 803 (1974); accord, Abel v. United States, 362 U.S. 217 (1960). It was further undermined by Illinois v. Lafayette, 462 U.S. 640 (1983), which upheld a booking search of possessions found on an arrestee. Finally, it is difficult to reconcile the Chadwick-Belton distinction with the holding of Chambers v. Maroney, 399 U.S. 212 (1970), which is that a vehicle subject to search on

the street may be removed and inspected at the station house. In light of Edwards, Abel, Lafayette, and Chambers, we submit that the search in Chadwick should have been upheld if a search on the street was proper. Conversely, the holding in Chadwick was correct if a search of the trunk at the time of arrest would have been unlawful.

We think that a warrantless search of the trunk would have been unlawful at any time. In Chadwick, it will be recalled, Government officials had planned the search for two days, the period during which two of the defendants traversed the country by train, disembarking in Boston, where the trunk was searched hours later. Presumably, a warrant, whose issuance was "reasonably predictable" (433 U.S. at 15), could have been obtained during that period of time. Cf. Coolidge v. New Hampshire, 403 U.S.

443, 471 (1971) ("we deal here with a planned warrantless seizure"). Unlike the typical arrest, involving a suspect and its probable contents. The use of the dog in the train station confirmed what arguably already amounted to probable cause. Cf. United States v. Place, supra.

In this case, by contrast, police were forced to act quickly before the defendants could drive away from the motel. Their warrantless arrest and the incidental search of their effects were entirely proper.

In Sanders v. Arkansas, supra, the arrest and search did not occur until after the defendant had placed the suitcase containing marijuana in the trunk of the taxicab and had driven away. This Court stated that it did not "consider the constitutionality of searches of luggage incident to the

arrest of its possessor. [Citation omitted.] The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." 442 U.S. at 764 n. 11. Since the defendants in this case were arrested before they entered their car and had access to their possessions before Castleberry voluntarily locked the car door and trunk, Sanders is obviously distinguishable.

(3)

The position of amicus is thus consistent with this Court's cases and is faithful to its admonition that "[t]here is no war between the Constitution and common sense." Mapp v. Ohio, 367 U.S. 643, 657 (1961). We doubt that "society is prepared to recognize as 'reasonable'" (Katz v. United States, 389 U.S. 347, 361

[1967] [Harlan, J., concurring]) an expectation of privacy which is formulated in the face of an attempt by police officers to effect a lawful custodial arrest and valid incidental search. We therefore submit that the legality of a warrantless search may not be defeated by the efforts of the arrestee who has placed the object of the search in a place to which police have otherwise lawful access.

CONCLUSION

For the foregoing reasons, the Judgment of the Oklahoma Court of Criminal Appeals should be reversed.

DATED: December 20, 1984

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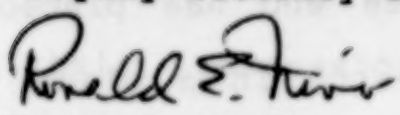

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CERTIFICATE OF SERVICE BY MAIL

THE STATE OF OKLAHOMA, Petitioners, vs. TIMOTHY R. CASTLEBERRY AND NICHOLAS RAINERI, Respondents.	No. 83-2126

RONALD E. NIVER, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 6000 State Building in the City and County of San Francisco, State of California; that on December 21, 1984, he served true copies of the attached Brief for the People of the State of California as Amicus Curiae on Writ of Certiorari to the Oklahoma Court of Criminal Appeals in the above-entitled matter on counsel for respondents by placing same

in envelopes addressed as follows:

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Hugh A. Manning
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Oklahoma City, Ok. 93103

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

RONALD E. NIVER
Deputy Attorney General

No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF OKLAHOMA,
Petitioner,

v.

TIMOTHY R. CASTLEBERRY

and

ICHOLAS RAINERI,
Respondents.

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Although the statement of the case in the Petition contains an essentially accurate review of the facts of the case, the Respondents would supplement that statement with several important facts that were not mentioned. Respondents would refer to the transcripts of the two trials in the same manner as the Petitioner. The transcript of proceedings held on September 1-2, 1981, wherein both Respondents were tried for possession of contraband found in the suitcases (F-82-227) will be referred to as Tr. I, and the transcript of proceedings held on September 23-24, 1981, wherein Respondent Castleberry was tried for possession of contraband found in the band-aid box (F-82-228) will be referred to as Tr. II.

The arresting officer admitted that he had the situation "under control" at the time back-up officers arrived. (Tr. I, 20). The officer also admitted that at the time of the search of the trunk, both Respondents were not close to the trunk and were either on the ground or at the front of the vehicle with their hands upon it. (Tr. I, 21). He further admitted that at the time of the search neither

Respondents had access to the keys to the vehicle (Tr. I, 21) and at the time of the search he felt no personal jeopardy from the Respondents. (Tr. I, 23). The officer further testified that at the time of the searches, neither Respondent had any opportunity to get into the car themselves so as to reach a weapon or destroy evidence. (Tr. II, 52).

INTRODUCTION

The case at bar involves the warrantless search of containers found in Respondents' automobile. This warrantless search revealed that the containers contained drugs. As Justice BRENNAN, joined by Justice MARSHALL, stated in his dissenting opinion in Illinois v. Gates, 103 S.Ct. 2317 at 2359 (1983):

> "Everyone shares the Court's concern over the horrors of drug trafficking, but under our Constitution only measures consistent with the Fourth Amendment may be employed by government to cure this evil. We must be ever mindful of Justice Stewart's admonition in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), that '(i)n times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagant' to some. But the values were those of the authors of our fundamental constitutional concepts.' Id., at 455, 91 S.Ct., at 2032 (plurality opinion). In the same vein, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), warned that '(s)teps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.' Id., at 86, 62 S.Ct. at 472."

Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to

a few specifically established and well-delineated exceptions. Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed. 576 (1967).

The exceptions are jealously and carefully drawn, and there must be a showing by those who seek exemption that the exigencies of the situation made that course imperative. Coolidge v. New Hampshire, supra. Thus it is encumbent on the Petitioner to show why the warrantless search of Respondents' automobile and its contents was permissible in the case at bar. The Petitioner would seek exemption from the Warrant Clause of the Fourth Amendment through the "automobile exception" and "search incident to arrest exception" to the requirement that all searches be sanctioned by warrant. Your Respondents would urge that, under the facts of the case at bar, neither of these exceptions would justify the search.

SUMMARY OF ARGUMENT

According to the principles of United States v. Ross, 456 U.S. 798 (1982), Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977), the facts of the case at bar do not present an "automobile exception" case allowing the warrantless search of the Respondent's automobile, and all containers therein. Assuming, arguendo, what Respondents do not concede. . . that sufficient probable cause existed for any search. . . such probable cause would have been directed solely towards the containers actually searched, i.e., the suitcases and the band-aid box, prior to their contact with the automobile, and their subsequent contact with the automobile becomes purely coincidental. As the Respondents' containers carried an expectation of privacy, and were in the exclusive control of the police at the time of the search, the determination of whether the privacy interests of these containers should be invaded, whether located in an auto or any other public place, should have been left to the judgment of a neutral and detached magistrate. Failure to allow such a determination by a

magistrate requires that any evidence contained in the items searched be suppressed.

The "automobile exception" cannot be used to support the warrantless search of Respondents' automobile because it lacked the requisite mobility at the time of the search to justify the exception, and because no probable cause existed to believe that the automobile, as opposed to the containers therein, concealed contraband. The Respondents' automobile was not stopped upon a highway nor occupied by Respondents at the time of their arrest. To the contrary, the vehicle was locked and parked in a private parking lot, with the keys in the sole and exclusive possession of the police, at the time of the search. The vehicle not being mobile or occupied at the time of the arrest and search, no exigency existed to justify not procuring a warrant. In addition, the confidential informant told the officer nothing about the automobile save its description and the state it was licensed in. There was no information that the auto contained drugs or was being used to transport drugs. The only information provided about drugs was that the informant had seen drugs in the motel room, and that some

were contained in suitcases. The Respondents would submit that such information is insufficient to provide probable cause to believe the automobile contained drugs, as opposed to the containers searched.

The warrantless search of the band-aid box located in the interior of the parked and locked vehicle cannot be justified as coming under the "automobile exception" to the Fourth Amendment Clause, or as a search incident to a lawful arrest under "per se" rule of New York v. Belton, 453 U.S. 454 (1981).

As in the case of the suitcases located in the trunk of the vehicle, the automobile exception will not operate to justify the search of the band-aid box because there was no probable cause to believe the automobile, as opposed to the containers inside it, contained contraband. The information provided by the informant supplied nothing about the vehicle but its make and license plate. The limited information provided facts which pertained only to seeing drugs in a motel room and in certain containers. In addition, the vehicle was never mobile on a street or highway, but parked and locked in a private parking lot, thereby lacking the

requisite mobility which justifies the exception in the first place. Finally, once the band-aid box had been reduced to the exclusive control of the police, no exigency existed which justified the police in not securing a warrant to search the box. United State v. Ross, supra.

The search of the band-aid box cannot be justified as a search incident to a lawful arrest, even under the broad and expansive "per se" rule of Belton, supra, because the Respondents were not occupants of the vehicle at the time of the arrest or search, the passenger compartment was not within reach of the arrestees at the time of the search, and the box had been reduced to the exclusive control of the police. Thus the search far exceeded the permissible scope of a search incident to a lawful arrest, as delineated in Chimel v. California, 395 U.S. 762 (1969) and reaffirmed in Belton, supra. The fact that the vehicle was parked and locked, with the keys thereto in the exclusive custody of the police, coupled with the fact that the Respondents were restrained by handcuffs and pointed weapons at the time of the search, makes it abundantly clear that there was no

possibility that the arrestees could have reached into the interior of the car to procure a weapon or destroy evidence.

Although Respondents recognize that a tension exists between the exclusionary rule and the interests of law enforcement, it is urged that the United States Supreme Court should not consider elimination or modification of that rule, as that issue was not pressed or passed on by the Oklahoma Court of Criminal Appeals in the case at bar. Since the record below was not compiled with that question in mind, and the Oklahoma Court of Criminal Appeals was not asked to consider proposed changes in existing remedies for unconstitutional acts, it would be inappropriate for the Supreme Court to consider such changes for the first time on appeal. In addition, the Oklahoma Court has not been given the opportunity to rest its decision on adequate and independent state grounds. The exclusionary rule is an issue which greatly divided the public and generates strong sentiments on both sides, adhering to the "not pressed or passed on below" rule of Cornwell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), would better serve to promote respect for

the adjudicatory process and stability of Supreme Court decisions.

The interests of Amicis and Petitioner in promoting a body of law which makes police effort more effective should not be gratified at the expense of substantial demise of the rights of privacy our founding fathers forged through the enactment of the Fourth Amendment to the United States Constitution, and which this Court has nurtured and protected over decades of attack by government. We should remember that the rights secured by the Fourth Amendment are for the protection of all citizens, innocent and guilty alike, and should not be sacrificed in the sole interest of promoting efficient law enforcement.

ARGUMENT

PROPOSITION I

THE "AUTOMOBILE EXCEPTION" TO THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION DOES NOT JUSTIFY THE WARRANTLESS SEARCH OF SUITCASES LOCATED IN THE TRUNK OF A PARKED AND LOCKED VEHICLE.

It is respectfully urged that the Oklahoma Court of Criminal Appeals was correct in holding that the mere fact that the suitcases in question had been placed in the trunk of a vehicle did not justify their warrantless search pursuant to the "automobile exception" to the warrant requirement of the Fourth Amendment to the United States Constitution first announced in Carroll v. United States, 267 U.S. 132 (1925), absent probable cause to search the vehicle itself.

While the Petitioner suggests that the Oklahoma Court of Criminal Appeals' ruling is "at odds" with this Court's ruling in United States v. Ross, 456 U.S. 798 (1982), it is the Respondents' position that the Oklahoma Court of Criminal Appeals' holding is entirely consistent with Ross, supra, as well as Arkansas v. Sanders, 442 U.S. 753 (1979) and United States v. Chadwick, 433 U.S. 1 (1977).

In Ross, supra, the police received information from a reliable confidential informant that a certain described individual was selling narcotics out of the trunk of a certain vehicle parked at a specific location. The informant told the police that he had seen this person sell drugs taken from the trunk, and that the individual had told him that he had additional drugs in the trunk of the vehicle. The police went to the location and found the described vehicle parked as predicted, but did not see the individual described by the informant. The officers left the area, and on their return they spotted the vehicle driving down the street with the described dealer at the wheel. After stopping the car and getting the individual out of it, a bullet was seen on the front seat of the car. A search of the car's interior revealed a pistol in the glove compartment, and the individual was placed under arrest and handcuffed. The officers then took the keys and opened the trunk, where a brown paper bag was found. Upon opening the bag, the police found glassine slips containing white powder. The paper bag was replaced and the car taken to the police station, when a more thorough search revealed a zippered leather pouch which contained

cash. The white powder proved to be heroin and was used to prosecute the individual. No warrant was obtained before the search at the arrest scene or at the police station. The Ross Court ruled that this was an "automobile exception" case, and the paper bag and leather pouch could be searched without a warrant.

The Ross Court squarely addressed the question "whether, in the course of a legitimate warrantless search of an automobile, police are entitled to open containers found within." 102 S.Ct. 2168. The Court considered "the extent to which police officers -- who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it -- may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view". 102 S.Ct. at 2159. (Emphasis added.)

The Court answered these questions by holding that, in the above situation, the police "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.' " 102 S.Ct. at 2159.

In reaching this holding, the Court began with a review of the decision in Carroll, supra, itself. After discussing the historical rationale upon which the "automobile exception" was founded, i.e., the mobility of automobiles and the impracticality of securing a warrant in those circumstances where an automobile is stopped upon a highway and the police have sufficient probable cause to believe contraband is being concealed in or transported by the automobile, the Court concluded that the scope of the exception to the warrant requirement applies "only to searches of vehicles that are supported by probable cause. In this class of cases, a search is not reasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not actually been obtained." 102 S.Ct. at 2164.

While it may be argued that this holding rejects the "exigent circumstances" rationale for the automobile exception by not specifically mentioning it in conjunction with the requirement of probable cause, it is equally logical that the requirement of "exigent circumstances" is inherent in any application of the automobile exception, and is

presumed to exist whenever the mobility of a vehicle necessitates bypassing the warrant requirement.

This argument seems more likely in view of the fact that the decision in Ross was apparently directed only toward mobile vehicles in which the police have probable cause to believe contain contraband. It is clear that Justice MARSHALL believed the Ross decision to be so limited, because, in his Ross dissent, 102 S.Ct. at 2173, he states: "The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars." 102 S.Ct. at 2174.n.1.

In Ross, as in Carroll, probable cause to search arose while the car was mobile and in circumstances where, due to that mobility, obtaining a warrant prior to the initial encounter with the car would have been impractical. Thus, "exigent circumstances", as required by Carroll, supra, Chambers v. Maroney, 399 U.S. 42 (1970), and Coolidge v. New Hampshire, 403 U.S. 443 (1971), did exist in Ross, and the Court's failure to specifically note this fact does not

necessarily mean that all pretenses of adherence to an "exigent circumstance" theory in automobile cases has been dropped. To the contrary, if any application of the automobile exception is presumed to require the existence of exigent circumstances, even if backward in time to the initial contact with the vehicle, then the Court's mentioning probable cause alone only emphasizes the strength of the probable cause requirement needed in addition to exigent circumstances. To reason otherwise would, as suggested by Justice MARSHALL, 102 S.Ct. at 2176, create a new probable cause exemption to the warrant requirement without a satisfactory justification for abandoning the preference for warrants. The word "automobile" would indeed become a "talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S., at 461-62.

In the case at bar, there can be no question that the vehicle searched was not mobile when the police encountered it. The car was parked in a motel parking lot, empty and locked. At the time of the search, the Respondents were restrained with handcuffs and armed

guards and the police had exclusive possession of the keys to the vehicle. At this point in time, the vehicle was no more mobile than a fixed storage building, and there was no reason for the police to by-pass the warrant clause of the Fourth Amendment. As the Court stated in Carroll, 45 S.Ct. at 285, and restated in Ross, 102 S.Ct. at 2163, the automobile "exception" is to the general rule that "(i)n cases where the securing of a warrant is reasonably practicable, it must be used". It is urged that it was reasonably practical for the police to have secured a warrant in the case at bar, and having failed to do so requires suppression of the evidence. It should also be noted that each of the cases cited by the Petitioner in support of the "automobile exception" theory had facts which showed probable cause to search the vehicle itself plus some exigency which rendered securing a warrant impracticable. None of the cases cited involved a parked and locked vehicle, secured at the time of the search, which the police had no probable cause to search.

Assuming that the fact that the police in Ross encountered the vehicle while it was being driven down a

street and thus securing a warrant was impractical satisfied Carroll's requirement of exigency, the decision in Ross can be analyzed in terms of the Court's requirement of probable cause and what locus that probable cause is directed toward. The Ross Court clearly held that in order for the automobile exception to justify the warrantless search of containers in a vehicle stopped on a highway, probable cause must have existed to search the vehicle independent of the containers in it. Requiring that probable cause exist to search the vehicle itself makes Ross a logical extension of Carroll, for in that case, the police had probable cause to believe that the car contained illegal liquor somewhere within it, although the police were not sure just where in the car it was located. Carroll did not reach the issue of whether a closed container could be searched, because no containers were found in the car. In Ross, the police had probable cause to believe drugs were located in the trunk of the car, but no information that drugs were located in a particular container. If, in Carroll, the police had encountered a container which could have held the object of their search but about which they had no information, they could clearly

have searched that container under the rationale of Ross. The probable cause ran to the vehicle as opposed to the container, and would have encompassed the vehicle and any container found within it. If, on the other hand, the police in Carroll had been told that the defendant possessed illegal liquor located in a box, a warrant would have been required to search that box under the Ross decision, even if the box had been located in an automobile that the defendant was driving.

That the "automobile exception" requires probable cause to search an automobile before containers therein can be likewise searched is made more clear by the Ross Court's analysis of United States v. Chadwick, supra, and Arkansas v. Sanders, supra.

In United States v. Chadwick, supra, federal railroad officials in San Diego became suspicious of a footlocker being shipped to Boston because it was unusually heavy and leaked talcum powder, a substance used to hide the odor of marijuana. Notified of these facts, narcotics agents in Boston met the train, intercepted the footlocker, and used a police dog to detect the presence of the contraband. The

agents did not seize the footlocker at this time, however, but waited until Chadwick arrived and the footlocker was placed in the trunk of his automobile. Before the engine was started, the officers arrested Chadwick and his companions, took the footlocker and his automobile to the Boston Federal Building, where, sometime later, it was opened without a warrant and a large amount of marijuana found. In ruling that the warrantless search of the footlocker was unjustified, the Court recognized that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile", 97 S.Ct. at 2484, and reaffirmed the general principle that closed packages and containers may not be searched without a warrant. "In sum, the Court in Chadwick declined to extend the rationale of the 'automobile exception' to permit a warrantless search of any movable container found in a public place." 102 S.Ct. at 2166. Although the agents had probable cause to believe the footlocker contained contraband, once the footlocker was taken to the Federal Building and was in the "exclusive control" of the authorities, no exigency existed requiring its immediate

search, and thus a search could not be lawfully made without a warrant. "When no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." 433 U.S., at 2482.

In Arkansas v. Sanders, supra, the Court dealt with facts similar to Chadwick, except in this instance a piece of luggage, which police had probable cause to believe contained marijuana, was carried in the trunk of a taxi in which Sanders was a passenger. After observing Sanders place the suitcase in the trunk of the cab and begin to drive away, the police stopped the taxi and ordered the driver to open the trunk. The driver complied and the police immediately conducted a warrantless search of the unlocked suitcase which revealed a large quantity of marijuana which was later used as evidence against Sanders.

The Sanders Court faced the issue of whether the "automobile exception" of Carroll controlled to allow a warrantless search, or whether Chadwick's "exclusive control" doctrine invalidated the search. In deciding that

the case fell on the Chadwick side of the line, the Court reasoned that the luggage of Sanders carried an "expectation of privacy" which could not be invaded without a warrant once the police had the luggage within their "exclusive control". Rejecting the argument that the luggage's contact with the automobile brought it within the "automobile exception" of Carroll, the Court stated:

> "A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides. But, as we noted in Chadwick, the exigency of mobility must be assessed at the point immediately before the search -- after the police have it securely within their control. See 433 U.S., at 13. Once the police have seized a suitcase, as they did here, the extent of its mobility is in no way affected by the place from which it was taken. Accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from other places." 99 S.Ct. at 2590.

Thus, as the opinion in Ross makes clear, what the police have probable cause to search determines whether a particular fact situation is a "container case", as in Chadwick and Sanders, or an "automobile exception" case, such as Carroll and Ross. If the police have probable cause to search an automobile, the "automobile exception" applies,

but if probable cause extends only to a container, then the police must secure a warrant to search it because of the owner's reasonable expectation of privacy in that container.

The Petitioner submits that the "automobile exception" should apply in the case at bar because probable cause existed which would have justified a magistrate in issuing a search warrant to search the automobile. Respondents would urge that, under the facts known to the arresting officer, there was insufficient probable cause to justify the arrest of Respondents, much less justify the search of Respondents' vehicle.

While Illinois v. Gates, 103 S.Ct. 2317 (1983), eliminated the "two-pronged test" of Spinelli v. United States, 89 S.Ct. 584 (1969), as rigid requirements to be met in evaluating the sufficiency of an informant's tip for probable cause purposes, this Court agreed with the Illinois Supreme Court "that an informant's 'veracity', 'reliability' and 'basis of knowledge' are all highly relevant in determining the value of his report." Gates, supra, at 2327. The Court stated that these issues are relevant considerations in the "totality of circumstances" analysis

that would henceforth govern the determination of probable cause sufficiency. A close examination of the information provided by the informant, even that information corroborated by the officer, reveals that it is unlikely that a magistrate would have deemed sufficient probable cause present.

Officer Taylor admitted that the informant in the case at bar did not identify himself, that he had never used the informant before, and had no basis for judging him to be reliable. (Tr. I, 18). The only basis of knowledge presented was the bare assertion that he had personally seen drugs contained in suitcases in Respondents' motel room. Having no established track record as a credible and reliable person, indeed, not having even been identified, there is no basis for believing he had seen drugs anywhere, and his information becomes no more probable than an anonymous tip. While it is admitted that the officer was able to verify some of the informant's information, the facts corroborated are entirely innocent in nature and present not the slightest hint of criminal activity. The name and description of the Respondents, their room number, and car and luggage

descriptions would be available to anyone working at the motel in question, and perhaps anyone who had been in the Respondents' room, as an invited guest or otherwise. There was no information provided that would indicate that the informant could recognize illegal substances or was lawfully in the room to have seen what he claimed. Contrary to the facts in Gates, supra, there was no prediction of future activity, and no suspicious activity by Respondents observed by the officer. At the time the officer pulled his weapon and denied the Respondents their freedom of movement, he had observed nothing more suspicious than the Respondents leaving their motel room with their luggage. It is respectfully urged that the observations of the officer at this time would not justify the arrest of the Respondents, as he had not observed any facts or actions which would suggest even a reasonable suspicion of criminal activity.

What probable cause did exist, whether sufficient or not, was most certainly directed at the containers carried by the Respondents, and not the automobile the containers were placed into. The informant gave no indication that he had seen drugs in any automobile and knowledge of the

vehicle's make and license plate, the only mention of the vehicle, serves only to corroborate that the Respondents were staying at the motel in question, and is certainly not sufficient to support a finding of probable cause to search it.

Every objective fact known to the officer suggested the containers as suspected locus of the contraband as opposed to the vehicle. The informant had told the officer of seeing drugs in the motel room and that some were contained in certain described suitcases. Respondents did not begin loading the automobile until some "five or ten minutes" after beginning his surveillance of the motel room (Tr. I, 8), so the drugs allegedly observed in the motel room had to be contained in the items placed in the vehicle or still remained in the room itself. The officer did not "smell" the odor of marijuana until the suitcases had been placed in the trunk of the vehicle, and it is interesting to note that the officer "wanted to make sure that there was actually marijuana in the suitcase" before he officially placed the Respondents under arrest. (Tr. I, 31) (Emphasis added.) Aside from undermining the degree of certainty that the

officer had, indeed, smelled marijuana, the statement points to the suitcases as the suspected location of the marijuana in the officer's own mind.

Respondents also urge that some deference should be paid to the Oklahoma Court of Criminal Appeals' finding of fact that "(T)he suspected locations of the contraband were the suitcases and the band-aid box which Castleberry threw into the car", (Joint Appendix, p. 36), as opposed to the automobile generally, as urged by the State of Oklahoma. As was stated in Aguilar v. Texas, 84 S.Ct. 1509 (1964), reviewing courts "will pay substantial deference to judicial determinations of probable cause . . . ." 84 S.Ct. at 1512. The Oklahoma Court of Criminal Appeals determined that probable cause existed to search the suitcases and band-aid box, but not the automobile generally. "In a fact-bound inquiry of this sort, the judgment of . . . state courts . . . should be entitled to at least a presumption of accuracy." Justice STEVENS and Justice BRENNAN, dissenting, Illinois v. Gates, 103 S.Ct. at 2361-62.

In the case at bar, as in Sanders and Chadwick, supra, "(I)t was the luggage being transported by respondent at the

time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental, as in Chadwick. The fact that the suitcase was resting in the trunk of the automobile at the time of respondent's arrest does not turn this into an 'automobile' exception case. The Court need say no more. (Citations omitted)." Chief Justice BURGER, concurring opinion to Arkansas v. Sanders, supra, as adopted in United States v. Ross, 102 S.Ct. at 2166-67.

It is respectfully urged, therefore, that the warrantless search of the suitcases located in Respondents' car trunk cannot be justified under the "automobile exception" because the police lacked probable cause to search the vehicle itself and no exigent circumstances existed which rendered securing a warrant impracticable. This is simply not an "automobile exception" case, but rather a "container" case which required a warrant to search the suitcases.

PROPOSITION II

THE SEARCH OF THE BAND-AID BOX FOUND IN THE FRONT SEAT OF THE VEHICLE WAS UNJUSTIFIED UNDER THE AUTOMOBILE EXCEPTION OR AS A SEARCH INCIDENT TO A LAWFUL ARREST.

Respondents would urge that the warrantless search of the band-aid box found in the front seat of the parked and locked vehicle cannot be justified under the "automobile exception" to the Fourth Amendment Warrant Clause any more than the warrantless search of the suitcases located in the trunk. As discussed previously in regard to the suitcases, neither the suitcases nor the band-aid box were discovered in the course of an ongoing search of a lawfully stopped vehicle. There was never any probable cause to search the vehicle itself, but rather, the containers placed in the vehicle, and their contents, were the object of the search. As Justice POWELL stated in his concurring opinion in Robbins v. California, 101 S.Ct. 2841 (1981), as restated in United States v. Ross, supra, "when the police have probable cause to search an automobile, rather than only to search a particular container that fortuitously is located in it, the exigencies that allow the police to search the entire

automobile without a warrant support the warrantless search of every container found therein." 101 S.Ct. at 2859, 102 S.Ct. 102 at 2618. In the case at bar the police had, at best, probable cause to search the band-aid box and suitcases prior to their contact with the automobile. The police searched the vehicle solely to gain access to the objects of the search (the containers and their contents) without probable cause as to the vehicle itself, and thus, under the principles of Ross, Sanders and Chadwick, supra, this is simply not an "automobile exception" case. In addition, it makes no difference that the band-aid box is a more or less likely spot to hide objects from public view. "The scope of a warrantless search of an automobile is thus not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe it may be found." Ross, 102 S.Ct. at 2172. The object of the search in the case at bar was drugs, and the place where the police had probable cause to believe they were located were the containers placed in the automobile, not the automobile itself.

The Petitioner would urge that the warrantless search of the band-aid box can be justified as a search "incident to a lawful arrest". Respondents realize that this Court has long recognized that the Fourth Amendment permits a warrantless search incident to a lawful arrest. While there is no question that the person of the arrestee may be so searched, the permissible scope of a search of the place where the arrest is made has not been easily defined. (Emphasis added.) In Chimel v. California, 395 U.S. 752 (1969), the Court attempted to delineate the proper bounds of such a warrantless search. In Chimel, supra, the defendant was arrested in his home for the burglary of a coin shop. For approximately an hour after the arrest, the police conducted a detailed search of defendant's entire house, finding several items of evidence that were later used against him. The police were armed with a warrant for the defendant's arrest, but had no warrant to search defendant's house. The Court ruled the the search and seizures were unlawful, because the search exceeded the permissible scope of a search incident to defendant's arrest. The Court found that the Fourth Amendment set forth a

preference for prior judicial approval of searches, and any exceptions to the warrant requirement are limited in scope by the justifications allowing the initiation of the search. The Court stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or an evidentiary item must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control' — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." Chimel, 395 U. S. at 762-763.

In New York v. Belton, 453 U.S. 454 (1981), however, the Court significantly expanded the authority of police officers to conduct warrantless searches of automobiles and their contents, even in the absence of probable cause to believe seizable items will be found. Belton held that, as an

incident to the custodial arrest of an occupant of an automobile, the police may search the passenger compartment of the automobile and any containers found therein. (Emphasis added.) In Belton, an officer stopped an automobile occupied by four persons for speeding on an open highway. While questioning the driver regarding ownership of the vehicle, the officer detected the odor of burnt marijuana. He also saw an envelope commonly used to sell marijuana, marked "Supergold", on the floorboard of the vehicle. The officer ordered the men out of the car and arrested them for possession of marijuana. The officer then searched the persons of each occupant, and, after separating them, examined the envelope and found it to contain a small amount of marijuana. He then searched the passenger compartment of the vehicle, including five jackets located on the back seat. Inside the zippered pocket of the jacket belonging to Belton, the officer found a small amount of cocaine. It was the search of this jacket that was the issue before the Court, and it held that the search of the jacket pocket was valid as incident to the custodial arrest of an occupant of the vehicle where the jacket was found.

Although departing from the case by case analysis used to determine the validity of searches incident to arrest under Chimel and adopting, instead, a "per se" rule intended to cover all searches incident to the arrest of occupants of vehicles, the Court did not break from the rationale of Chimel. The Court stated that "Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic context. It in no way alters the fundamental principles in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S. at 460 n.3.

Following the rationale of Chimel, the Court reasoned that, in regard to an occupant of a vehicle, articles inside the passenger compartment are "in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'" Belton, 453 U.S. at 460 (quoting Chimel, 395 U.S. at 763.) The Court stated that "if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach." 453 U.S. at 460. (Emphasis added.)

Taken within the context of the facts of Belton, where one officer had stopped a vehicle occupied by four persons on a major highway, and where neither the occupants nor their property had as yet been reduced to the exclusive control of the police, the Court's "per se" rule would seem to logically support the rationale of Chimel. In the case at bar, however, the Respondents were not occupants of the vehicle or even recent occupants thereof; the vehicle was parked and locked in a parking lot with the police in the exclusive control of the keys, and more than one officer had the Respondents restrained under armed guard. At the time of the search, there was not the slightest possibility of the Respondents procuring a weapon or destroying evidence from the interior of the case. The rationale of Chimel being absent, the "per se" rule of Belton would not operate to justify the warrantless search of the vehicle as incident to a lawful arrest.

It is important to note that the Belton court found neither Chadwick nor Sanders, supra, to be relevant, but rather distinguished them on the ground that "neither of those cases involved an arguably valid search incident to a

lawful custodial arrest", 453 U.S. at 461-462, because the footlocker in Chadwick was in the exclusive control of the police at the time of the search and the luggage of Sanders was not within the "immediate control" of the defendants at the time of the search. 453 U.S. 462. The case at bar does not involve an "arguably valid" search incident to a lawful arrest, because the band-aid box, as well as the suitcases, were in the exclusive control of the police and not within the "immediate control" of Respondents at the time of the search.

It is urged that the fact that the vehicle was locked at the time of the search has special significance in light of the Court's holding in Belton. If the vehicle is locked, the interior of that vehicle is placed in much the same position as the trunk of the vehicle. Insofar as searches incident to the arrest of occupants of a vehicle are concerned, the trunk of the automobile has been specifically excluded by the Court in Belton. 453 U.S. at 460-61 n.4. If the vehicle is locked, and particularly if the keys are in the exclusive control of the police, then the interior of the vehicle, like the trunk, would almost certainly be outside the immediate

control of the arrestee. This is true because of the time it would take, and the difficulty he would have, in attempting to unlock and open it in order to obtain a weapon or to destroy or conceal evidence.

It is further urged that the decision in Belton, supra, must be read in light of the Court's subsequent decision in United States v. Ross, supra. As Ross grants the police significant authority to conduct warrantless searches of automobiles and their contents upon probable cause, it would seem that Ross would have the effect of limiting the intrusiveness of Belton and undermining the reasoning for its holding. Ross requires probable cause to search automobiles and containers therein, while Belton permits searches of the passenger compartment and its containers incident to an automobile occupant's arrest, for any offense, regardless of probable cause, even if the presence of weapons is unlikely and evidence of a crime non-existent. Belton thus requires far less justification for invasions of automobile privacy than does Ross. Justice STEVENS, in his concurring opinion in Belton, argued that the search should have been upheld under the automobile exception as opposed to the search

incident to arrest theory. Fearing that the Belton rule could lead to police abuse by allowing searches based on arrests for even the most petty offenses where the police had no reason to believe evidence was contained in the automobile, STEVENS contended that Belton would grant authority to search far exceeding the scope permitted by the automobile exception. He stated: "Under the Court's new rule, the arresting officer may find reason to (take the driver into custody and thereby obtain justification for a search of the entire interior of the automobile) whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation." 453 U.S. at 452. Since such an extensive search would be precluded under the automobile exception of Ross unless the officer had probable cause to believe that the vehicle contained contraband or other evidence of a crime, Justice STEVENS's concerns about the expansiveness of Belton would seem to be satisfied. It is urged that, in light of Ross, the far-reaching rule of Belton is unnecessary and ought to be reconsidered. Although the Respondents contend that the warrantless search of the band-aid box and suitcases

contained in the locked vehicle cannot be justified under Belton or Ross, it is urged that the Court abandon the "per se" rule of Belton and return to the stated rationale of Chimel, allowing the police, upon making a lawful custodial arrest, to search an automobile and any containers therein whenever, under the facts of the particular case, they are " within (the arrestee's) immediate control — construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence". Chimel, 395 U.S. at 763. In light of the Court's subsequent decision in United States v. Ross, supra, failure to so modify Belton would seem to render it superfluous.

It is respectfully urged, therefore, that neither the "automobile exception" or search "incident to arrest" theory would justify the warrantless search of the band-aid box.

PROPOSITION III

THE UNITED STATES SUPREME COURT SHOULD NOT CONSIDER ELIMINATION OR MODIFICATION OF THE FEDERAL EXCLUSIONARY RULE BECAUSE THE ISSUE WAS NOT PRESSED OR PASSED ON BELOW.

The Petitioner would argue that the exclusionary rule should not be applied in the case at bar, even if a Fourth Amendment violation occurred, for a number of reasons. See Petitioner's Brief, pages 32-35. It should be noted, however, that the State of Oklahoma never raised or addressed the issue of whether the federal exclusionary rule should be modified in any respect in the Oklahoma Court of Criminal Appeals, and that the Oklahoma Court never considered the question. It is urged, therefore, that this Court should not consider the question.

The so-called "not pressed or passed on below" rule arose from Corwell v. Randell, 10 Pet. 368, 9 L.Ed. 458 (1836), wherein the Supreme Court held that Section 25 of the Judiciary Act of 1789, which gave birth to the Supreme Court's certiorari jurisdiction over decisions from state courts through 28 U.S.C. Section 1257, furnished the Court with no jurisdiction unless a federal question had been both

raised and decided in the state court below. Whether the "not pressed or passed on below" rule is jurisdictional, State Farm Mutual Automobile Insurance Co. v. Duel, 324 U.S. 154 (1945), or merely a prudential restriction, Terminiello v. Chicago, 337 U.S. 1 (1949), Vachon v. New Hampshire, 414 U.S. 478 (1974), consideration of whether the exclusionary rule should be eliminated or a "good faith" exception allowed to provide for warrantless searches of containers found in public places would be contrary to the sound justifications for the rule.

The purposes underlying the rule are as applicable to the State of Oklahoma's failure to have opposed the assertion of a particular federal right as is a party's failure to have asserted the right initially. First, "questions not raised below are those on which the record is very likely to be inadequate since it certainly was not compiled with those questions in mind." Cardinale v. Louisiana, 394 U.S. 437, 439. Second, "due regard for the appropriate relationship of this Court to state courts," McGolrick v. Compagnie Generale, 309 U.S. 430, 435-436 (1940), requires that those courts be given an opportunity to consider the

constitutionality of the actions of its police officers, as well as proposed changes in existing remedies for unconstitutional acts. Finally, requiring the State of Oklahoma to first argue modification of the federal exclusionary rule to Oklahoma courts allows the state court to rest its decision on adequate and independent state grounds. Cardinale v. Louisiana, supra, at 439.

As did the lower court in Illinois v. Gates, 103 S.Ct. 2317 (1983), the Oklahoma Court of Criminal Appeals applied the federal exclusionary rule as a routine act once a violation of the Fourth Amendment had been found, and, as there was no contest on the issue of whether the facts of the case warranted a modification of the exclusionary rule, same was not considered or ruled upon. Since there was no adversarial contest before the Oklahoma court reaching the exclusionary rule's application or modification, the Supreme Court should not consider such a question at this time. "Where difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on our discretion", Illinois v. Gates, supra, and by doing so the Court promotes respect for its adjudicatory process and the stability of its decisions.

PROPOSITION IV

THE COURT'S DECISION IN UNITED STATES v. ROSS IS SUFFICIENTLY CLEAR TO PROMOTE EFFECTIVE LAW ENFORCEMENT AND FURTHER EXPANSION IS UNWARRANTED.

Both Petitioner and Amici ask the Court to extend the Court's decision in Ross to eliminate any distinction between automobiles and closed containers in the interest of promoting efficient law enforcement and judicial economy.

Respondents would urge that such an extension would extract too high a price in the loss of long recognized rights of privacy, heretofore protected by the warrant requirement of the Fourth Amendment, to justify those ends.

The Bill of Rights is a profoundly antigovernment document, and it is urged that the framers of that document intended that it make governmental interference in an individual's rights of privacy as inconvenient as possible. The founding fathers never intended that the judgment of a police officer be substituted for a neutral and detached magistrate, for they knew that the impairment of substantial individual liberties would result. To grant further authority to police officers to conduct warrantless

searches would only serve to "obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." Johnson v. United States, 68 S.Ct. 367 at 370.

The bright line rule asked for by Petitioner and Amici . . . that "once there is probable cause to search a car, the police may search any container within any part of the car". . . is exactly what the Court's ruling in Ross provides. It is sufficiently clear to be understood by law enforcement and private citizens alike. To grant broader warrantless search power to police will only serve to whet the evergrowing appetite of law enforcement, to the end that soon the Fourth Amendment warrant requirements for searches and seizures of personal affects outside the home would be non-existant.

Effective law enforcement is an insufficient reason for sacrificing constitutionally protected interests, and it is urged that this Court refrain from granting expanded powers to government at the expense of the fundamental rights of its citizens.

CONCLUSION

For the reasons stated, it is respectfully urged that this Court affirm the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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No. 83-2126

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

THE STATE OF OKLAHOMA
Petitioner,
v.
TIMOTHY R. CASTLEBERRY
and
NICHOLAS RAINERI
Respondents.

ON WRIT OF CERTIORARI TO THE
OKLAHOMA COURT OF CRIMINAL APPEALS

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

The State contends that the recent case of United States v. Johns, 105 S.Ct. 881 (1985), supports the arguments made by the State in its brief-in-chief. In that case, this Court held that there was probable cause to seize, and then search wrapped and sealed packages which were found in the back of parked trucks.

The probable cause factors in Johns support a finding of probable cause in the present case. In Johns, after surveilling trucks at a small private airstrip near the Mexican border and observing the arrival and departure of aircraft, the officers approached the rear of one of the trucks, ordered the defendants to come from behind the trucks, and lie on the ground. The arresting officers then walked toward the trucks, smelled the odor of marijuana, and observed packages in the back of those trucks which were wrapped in dark green plastic and sealed with tape.

This Court upheld the warrantless seizure of the packages and the subsequent search of such. The Court specifically noted that when the officers detected the odor of marijuana they had probable cause to believe that the vehicles contained contraband. 105 S.Ct. at 884. The Court

also noted that contraband "might well have been hidden elsewhere in the vehicles." 105 S.Ct. at 884.

In the present case, in addition to the facts which were known to Officer Taylor at the time he approached the defendants and ordered them to place their hands on the vehicle, the evidence revealed that Officer Taylor detected the scent of marijuana coming from the trunk of the defendants' vehicle (Tr. I, 11). Therefore, the holding in United States v. Johns, supra, should apply to the present case and this Court should find that Officer Taylor had probable cause to search the vehicle therein.

In Johns the Supreme Court again held that there is no requirement that exigent circumstances exist in order to justify the warrantless search of a vehicle lawfully in police custody when there is

probable cause to believe it contains contraband. 105 S.Ct. at 885. The Court also noted that United States v. Chadwick, 433 U.S. 1 (1977), did not involve the automobile exception recognized in Carroll v. United States, 267 U.S. 132 (1925), "because the police had no probable cause to believe that the automobile, as contrasted to the footlocker, contained contraband." 105 S.Ct. at 884. Therefore, this statement supports the State's contention in its brief-in-chief that since probable cause existed to support the belief that contraband "might well have been hidden elsewhere" in the vehicle, the search was valid.

The State also contends that the holding in Johns contradicts that portion of the holding by the Oklahoma Court of Criminal Appeals which stated that if an

officer knows the specific location of the contraband in the vehicle, he or she must obtain a search warrant. State v. Castleberry, 678 P.2d 720, 724 (Okl.Cr. 1984); A.34. In Johns this Court stated that "the officers no doubt suspected that the scent was emanating from the packages that they observed in the back of the pickup trucks." 105 S.Ct. at 884. Nevertheless, the Court upheld the warrantless search of those packages.

For these reasons and for the reasons stated in the brief-in-chief filed by the State of Oklahoma in the present case, the State contends that the officers had probable cause to conduct a search of the defendants' vehicle and every part of the vehicle which may have contained the object of the search, including the compartments and containers inside of such.

United States v. Ross, 456 U.S. 798, 825 (1982); United States v. Johns, supra, 105 S.Ct. at 885.

CONCLUSION

For the reasons stated in the brief-in-chief and in this reply, the State of Oklahoma requests this Court to reverse the judgment of the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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